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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON
Respondent.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PART I:

Opinions of the State Courts

IN JUSTICE COURT, RICHLAND PRECINCT,
BENTON COUNTY WASHINGTON,
BEFORE HON. ALBERT J. YENCOPAL,
JUSTICE OF THE PEACE

STATE OF WASHINGTON, *Plaintiff*, v. WILLIAM RABE, *Defendant*.	No. 2109 ORDER DENYING MOTION TO SUPPRESS September 27, 1968

Let me clarify from the outset some matters that were considered true or representations made as though they were accurate. I believe that counsel for the defense said that Delaware is the only state that still had a censorship board. This is not true. It is just across the state line—Maryland. Also, some representation was made that the movie passed the censorship board in that state. That is partially true. However, portions of the film were cut by the censorship board. These cuts were made with the consent of the distributor. Specifically, the scene depicting an alleged close-up of Carmen and Baby Lucas embracing through colored glasses was cut. This movie was shown in Chicago under an "Adults Only" advertisement, and thus did not come within the purview of the Chicago Review Board. It was not shown in the City of Detroit, which also has a review board. Gentlemen, I have correspondence to that effect if you wish to examine the same.

Now, to get to the crux of this hearing—the defendant's motion to dismiss the charge or to suppress the evidence. Sgt. Gordon testified under oath at a hearing specifically held in the court room, and a part of which was trans-

cribed, about the movie. In addition to the portions contained in the transcript, he also testified about two other scenes—one in which the girl made contact with a bottle of pop and also the scene of two people apparently having intercourse as seen through colored glasses. He further testified that the whole movie was filth, and that he would not take his wife to see it. I have notified the defendant's counsel of the other scenes to which Sgt. Gordon had testified so that he has not heard them for the first time. Even though I followed the procedures formulated by the Supreme Court, I was not aware of them at the time I did this. I did this on my own initiative—so as not to consider lightly charges made involving matters normally guaranteed under the free speech amendment. I did judicially scrutinize the complainant about the movie before I issued the warrant. I did this in light of determining if there was probable cause to make an arrest for showing an obscene movie—obscene as defined by the Supreme Court in *Roth vs. United States,* 354 U.S. 476; 77 Sup.Ct. 1304; 1 L.Ed. (2d) 1498. The defendant interprets the guidelines as set forth in *Marcus vs. Search Warrants of Property at* 104 *East* 10*th St.,* 367 U.S. 717; 81 Sup.Ct. 1708; 6 L.Ed. (2d) 1127, specifically that the judge must make inquiry "designed to focus searchingly on the question of obscenity", as meaning that I must determine beyond a reasonable doubt at that hearing the movie was obscene. This is not true. The 4th Amendment to the United States Constitution regarding unreasonable search and seizure asserts that the people will have the right to be secure in their persons and property, and that no warrant will issue but on probable cause. The question of whether the quantum of proof required to issue a warrant on probable cause is the same as that necessary to es-

tablish guilt was clearly answered in the negative in the cases of *Brinegar vs. U.S.*, 338 U.S. 160; 69 Sup.Ct. 1302; 93 L.Ed. 1878; and *Draper vs. U.S.*, 358 U.S. 307; 79 Sup.Ct. 329; 3 L.Ed. (2d) 327; I quote from the Draper case.

> "That emphasis (guilt and probable cause as one) we think, goes much too far in confusing and disregarding the difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. It approaches requiring (if it does not in practical effect require) proof sufficient to establish guilt in order to substantiate the existence of probable cause. There is a large difference between the two things to be proved (guilt and probable cause) as well as between the tribunals which determine them, and therefore a like difference in the quanta and modes of proof to establish them."

The purpose of the probable cause hearing was a procedure designed to focus searchingly on the question of obscenity. Now, I think that the Supreme Court is not playing games with us and now will enter into the field of saying that it shall also review whether, under all of the facts, I had made a proper judgment in saying probable cause existed. This is why the emphasis is on procedure.

I have read all of the cases submitted to me in the briefs of the parties. Let me compliment both parties who are taking the legal questions posed herein very seriously.

The case of *A Quantity of Books vs. Kansas*, 378 U.S. 205, struck down a statutory scheme which would amount to prior restraint of books. This differs from the case at bar considerably. Here, there is no prior sweeping restraint. An arrest was made on a warrant issued on prob-

able cause. The film was seized as evidence indicental to the arrest. Furthermore, the Supreme Court had a clear opportunity to pass on the question of whether an adversary hearing is necessary prior to the seizure of film. I speak of the case of *Lee Art Theatre, Inc. vs. Virginia,* 20 L.Ed. (2d) 1313. They chose to ignore the question. I fully realize the ruling of the case of *Metzger vs. Pearcy,* 393 F. (2d) 202, but I do not interpret the *Quantity of Books* case as did that Court. That opinion is not binding on this Court. I must deny the motion.

DONE By the Court this 27th day of September, 1968.

/s/ ALBERT J. YENCOPAL
Justice of the Peace

IN JUSTICE COURT, RICHLAND PRECINCT,
BENTON COUNTY, WASHINGTON,
BEFORE HON. ALBERT J. YENCOPAL,
JUSTICE OF THE PEACE

STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.*	No. 2109 DECISION October 7, 1968

I have read the following United States Supreme Court cases to-wit: *Beauharnair* [sic] *v. People of State of Illinois,* 343 U.S. 250, 72 S.Ct. 725, 96 L.Ed 919, which upheld a conviction of libel; *Near v. State of Minnesota ex rel. Olson,* 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed 1357, which overturned a conviction against a newspaper; *Roth v. U.S.,* 354 U.S. 476, 1 L.Ed(2d) 1498, 77 S.Ct. 1304, which upheld a conviction of Roth who used the mails to distribute obscene writings and also set up the present test of obscenity; *Court in Grove Press Inc.* [sic] *v. Gerstein,* 378 U.S. 577, 84 S.Ct. 1909, 12 L.Ed(2d) 1035, a 5 to 4 decision reversing a Florida State decision declaring Henry Miller's book "Tropic of Cancer" to be obscene; *Jacobellis v. Ohio,* 378 U.S. 184, 12 L.Ed(2d) 783, 84 S.Ct. 1676, in which the contemporary community standard was stated to be on a national scale, and that a portrayal of sex is not utterly without redeeming social value if the material deals with sex in a manner that advocates ideas, or has literary or scientific or artistic value or any other form of social importance; *Kingsley Books v. Brown,* 354 U.S. 437, 1 L.Ed (2d) 1469, wherein the Court upheld a New York statute dealing with obscene literature; *Kingsley International*

Pictures Corp. v. Regents of Univeristy of State of New York, 360 U.S. 684, 3 L.Ed(2d) 1512, 79 S.Ct. 1362, which struck down, as being unconstitutional, a New York statute which prohibited the showing of acts of sexual immorality as desirable—the case involving a movie made from D. H. Laurence's "Lady Chatterly's Lover"; *Joseph Burstyn Inc. v. Wilson*, 343 U.S. 495, 72 S.Ct. 777, 96 L.Ed. 1098, which permitted the showing of the movie "The Miracle"; *A Book v. Attorney General*, 383 U.S. 413, 16 L.Ed(2d) 1, 86 S.Ct. 975, which declared the book commonly known as "Fanny Hill" not to be obscene; *Ginzburg v. U.S.*, 383, U.S. 463, 16 L.Ed(2d) 31, 86 S.Ct. 942, which upheld the conviction of Ginzburg for selling obscene literature; *Manual Enterprizes Inc. v. Day*, 370 U.S. 478, 8 L.Ed(2d) 639, 82 S.Ct. 1432, which declared that publications that may arouse the sexual interest of homosexuals falls short of arousing the interest of the average person, and thus not obscene; *Times Film Corporation v. Chicago*, 365 U.S. 43, 5 L.Ed (2d) 403, 81 S.Ct. 391, which upheld prior censorship of movies; *Teitel Film Corporation v. Cusah*, 19 L.Ed(2d) 966, declared the Chicago ordinance unconstitutional because it failed to guarantee a speedy judicial determination on movies subjected to prior restraint, and *Freedman v. Maryland*, 380 U.S. 51, 13 L.Ed. 649, 85 S.Ct. 735, upon which case the Teitel decision was predicated. In addition, I found the annotations in 5 ALR(3d) 1158 and 11 ALR (3d) 1276, as well as the book entitled "Movies, Censorship and the Law," written by Ira H. Carmen, to be very helpful. Through the good offices of the Clerk of the Washington State Supreme Court, I received a copy of a decision filed September 26, 1968, entitled *Fine Arts Guild, Inc. v. The City of Seattle, et al*, which struck down the

licensing procedures established by the City of Seattle with respect to the classification of movies. In short, the Court said it was a prior restraint without judicial determination.

It is clear from these cases that the majority of the Judges of the U.S. Supreme Court, (and this is a fluid and slim majority) that [sic] obscenity is defined as follows: whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interests. As stated in the case of *A Book v. Attorney General,* cited above,

> "Under this definition, as elaborated in the subsequent cases, three elements must coalesce; it must be established that (a) the dominant theme of the material taken as a whole appeals to the prurient interests in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value."

None of the above criterial [sic] can be properly applied unless first, there is some relationship established between the average person and a prurient interest in sex, the average person and the contemporary community standards, the average person and redeeming social values.

In the main, the average person is an integrated part of the family structure. There are exceptions, but we are concerned with the average person. Traditionally and historically, the families have joined together at some personal sacrifice to establish and preserve an orderly community.

The term community therefore, describes the bringing together of families with common purposes and interests—for the provision of law and order, services, schools and

facilities for their convenience, protection and preservation. Within any community there are individuals, and certainly the family is made up of individuals. Each individual has the right to exercise rights within the framework of the community, but the basic cornerstone of a community, and in fact of a democracy is the family unit. If it were not for the family and the mutual responsibilities of the members of the family to itself and to the community, and vice versa, democracy would give way to social anarchy. Speaking conversly, if the overriding purpose of society was solely for the benefit of the individual directly, rather than to his benefit and security through the family, certainly the laws and institutions we now have would be grossly different in makeup and character. However, our laws and institutions are aimed at meeting the family or community interests and needs, and through this framework, then, the rights and needs of the individuals are secured. It is in this light that the average person would view his relationship to the community.

Whether a particular act or expression is within the purview of a community standard would be determined by whether such act or expression will definitely be an asset toward preserving the family unit or have an adverse effect upon it. The area between these two view points may, at times be clouded, but it is discernible.

In this makeup, we have imposed many forms of restrictions upon our right of public expression because the existence of our democratic structure demands it.

We have laws which prohibit the right to use words which libel or slander someone—the ultimate good to society from this limitation is that men and women should

not be lowered in esteem or should not be shunned by their social community.

In the case of perjury, personal advocacy must be subordinate to the truth and or realism or an ascertainable fact. The law of perjury demands we limit our words to the truth or to a knowledgeable fact. Because of this limtiation of free expression, society benefits. We submit our differences to be settled, through established legislative and judicial procedures rather than through individual determination.

A very recent expression by the peoples legislatives [sic] has been the truth in lending and the truth in packaging bill, which established uniformity and conformity in product and fine print subtitles, that intentionally or otherwise have tended to be misleading to this nation of communities.

Clear examples of protection afforded to the public and community have been cited, but as an additional clear and concise example of protecting the established community standard is Richland Municipal Code 9.04.030, which prohibits the use of vulgar, obscene or immoral language in public. Similar ordinances appear in the lawbooks of virtually every community in the nation.

Finally, we have the particular state statute in question which prohibits the showing of an obscene movie.

All of these are limitations upon free expression of speech. They have one thing in common—namely that the utterance is directed at a state of mind or contributing to a state of mind. The average person seeks to limit these public expressions because they detract from and destroy a community accepted notion or action. It is not the terminology of itself that is bad, but rather what impression

that terminology conveys to the mind of the audience. For we act as we are taught and lead [sic] to think.

It is in this vein, then, that we look at the average person and his attitude toward a particular material that has sex connotations—having a realization of his relationship to the community and a realization that the community must be preserved. Thus, he feels concern for his children and their relationships with others in the community and rightfully doubts the contribution of this material to the families' established mores or to the beneficial edification, education or enlightenment of the offspring toward accepting a responsible future role in the community.

Clearly a marriage and the family is the basic unit of society. And within the context of the marriage, sex is a normal and integral part of it. But the average person does not condone the performance of any sex expression in the public park or on the front lawn. To do so is an affront to his neighbors. Adultery is not a way of life. Nor is lesbianism, homosexuality nor sodomy. In fact, these are considered as crimes, whether committed publicly or privately. These are considered as perversions.

The average person would not teach these sexual abberations to his children. Nor would he approve of such education or encouragement by the clergy or school. These acts not only constitute a contradiction to the established social pattern of marriage and family, but distort and degrade the historical, traditional and anticipated furtherance of our communities which since the beginning of recorded time has been based upon family and community relationships.

There are gradations of tolerance of sexual discussion and exposure within the community. But this depends upon the nature of the subject, the selectivity of the audience, the manner of expression and the location at which it transpires. The book "Fanny Hill" may appear on the shelf of any supermarket. Yet, in that same supermarket, its most sensual portrayal of a sex scene depicted could not be displayed to promote the sale of the book. There have been court cases involving books and movies but the sections of the books and scenes in the movies that have been alleged to be obscene and offensive have not been vividly or graphically portrayed on the radio, nor upon a television network nor pictorally or verbally appearing in the newspapers across the land. The reason for this appears to buttress the courts [sic] contention, that these daily forms of public communication that go into the house and school have not in the past and, for reasons of community representation and concern, would not become a vehicle for this type of material to the community interest and morals they reflect and serve. Additionally, this same principle applies to the billboard advertising. And without question, one would not expect to find representations of scenes portraying sex as appeared in the movie "The Fox" upon a billboard along the highway and open to view by occupants of school buses or vehicles passing by carrying families of this or any other community.

There comes a time, however, wherein the balance of community attitudes toward philosophies versus a community attitude toward its own well-being is reached. At the point that the self-established community becomes concerned about the public exposures that are contrary to its life and teachings, then the commuity and its families

must act out of self preservation. If, indeed, a community has cause to believe that a particular material can either prompt, promote or suggest condonment [sic] of certain actions that are offensive or contrary to either established law or accepted standards, or has cause to believe that such acts are in fact occurring, then, most assuredly, the same community has the right, indeed, the obligation to initiate the necessary action. Such a view is in keeping with the position taken by Justice Douglas and Justice Black,—that freedom of expression can be suppressed if, and to the extent that, it is so closely brigaded with illegal action, as to be an inseparable part of it.

In review, therefore, we take the Roth test, point for point as seen by the average person—who is part of a family structure and views things in that light. First, the dominant theme must be sex,—that is, there must be a saturation of sex. Secondly, although it may be offensive to some, bold to others, he must view it as being patently offensive to the average person in the community,—to the average member of the family. He must view it nationwide in this light. Third, this saturation of sex, even though patently offensive to the average person in the community, must have some justification for its existence—however slight—but it must have redeeming value to the social structure.

Should the saturation of sex, being the dominant theme, be patently offensive to contemporary standards and there is cause to believe to the average person that it will erode his society—erode his marriage, then there must be a further finding that it does not have some social value. If found to erode society, it would be difficult to say, at the same time, that it contributes to it. Whether there is cause to believe that such actions—the exposure of sex contrary

and affronting to community standards will destroy the community—is for the legislature and not the courts to determine. Those who do not believe so should seek an amendment to the law or its abolishment in the legislature. The statute in question is the product of thinking that a saturation of sex could destroy the community. The legislature prescribed the court at this level to determine the danger to the existence of the community. And having established this court of this level rather than those of other jurisdiction is well founded [sic], because of our direct and daily contact with the moral fiber of the community. Thus, the average person has delegated to this court whether some expression should be permitted or should be suppressed.

This court, therefore, views the movie in accordance with the test set forth by the Supreme Court—namely through the average man in the community of the United States, who, for the most part is a family head—and one who seeks to perpetuate the community he has created.

(1) I find that the movie Carmen Baby has as its main theme—its dominant theme—a prurient interest in sex. Here is why I say that. Look at the numerous sex scenes. First the fondling of the breast, the fondling of the policeman's genitals, the naked [man] and woman in bed, and not husband and wife, the lengthy vivid and precise portrayal of every move—and from close up of the sex scene in bed when Carmen orally copulated the policeman and then a later scene when he did the same to her . . . the dance around the bottle wherein she masterbated [sic] herself . . . . the lesbian scene with the wife of the parole board officer . . . : all in fine and minute and closeup detail . . . and the act of sex intercourse which was taken through colored

glasses and took about five minutes to portray . . . and numerous other short scenes. The non-sex plot, about 15 minutes in duration, was the fight of the woman, the chase, the scenes at the police station, the entrance of Baby Lucas, and the killing of Carmen.

(2) The movie was an affront to contemporary community standards and patently so. The average person would not tolerate any of these being displayed outdoors, so that it invades the homes of the surrounding residents and can be seen from the highway. The average person seems to still rule this country. I judge his standards by the books he buys, the movies he sees or the records he purchases over a period of time. The Bible is the best seller by far. "Sound of Music" has the largest box office movie attraction, but this is second to "Gone with the Wind." And "White Christmas" is the best record seller. The various closeups [sic] shots of sex perversion and of acts that normally are private and in marriage certainly, is patently offensive to the average person—who is normally the family head.

(3) The average person would be hardpressed to find any redeeming social value. It must give some betterment to the social structure. Some testified that it was a replay of the original plot of "Carmen." I believe that the average person would find this portrayal to profane both the original story of Carmen or the opera Carmen. It has not redeeming social value.

I find the defendant guilty.

DONE By The Court this 7 day of October, 1968.

/s/ ALBERT J. YENCOPAL
Justice of the Peace

BENTON COUNTY
Office of County Clerk and
Clerk of Superior Court
FILED
Sep 22, 1969
LAURA BRADER, Clerk
By *Sue Bishop*, Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

THE STATE OF WASHINGTON, *Plaintiff*,

v.

WILLIAM RABE, *Defendant*.

No. 3123

FINDINGS OF FACT AND CONCLUSIONS OF LAW

September 22, 1969

This matter having come on regularly to be heard on the 2nd day of April, 1969, the plaintiff being represented by Curtis Ludwig and Richard Bennett, Deputy Prosecuting Attorneys, and the defendant appearing and being represented by his attorney, Rembert Ryals; and evidence and argument of counsel having been heard and good cause appearing therefore, the Court makes the following:

FINDINGS OF FACT

I

That on August 25, 1968 through August 29, 1968, the motion picture film "Carmen Baby" was exhibited at the Park-Y Drive In Theatre in Richland, Benton County, Washington, which was managed by the defendant, William Rabe.

II

That said Park-Y Drive In Theatre faces a residential area of the City of Richland and an overpass providing a clear view of the screen to residents of the area and passing motorists.

III

That individual portions or scenes of the movie have a dominant theme which appeals to a prurient interest in sex, is patently offensive because it confronts contemporary community standards relating to the representation of sexual matters and is utterly without redeeming social value.

IV

That passing motorists and residents outside the theatre are in a position to see only individual portions or scenes of the movie.

From the foregoing Findings of Fact the court makes the following:

CONCLUSIONS OF LAW

I

That the Court has jurisdiction of the defendant and the subject matter herein.

II

Individual portions or scenes of the movie "Carmen Baby" are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves.

III

That the defendant, William Rabe, is guilty of exhibiting an obscene movie and judgment and sentence should be entered accordingly.

DONE IN OPEN COURT this 14 day of Steptember, 1969.

/s/ JAMES J. LAWLESS
Judge

Presented by:
/s/ CURTIS LUDWIG
CURTIS LUDWIG, Deputy
Prosecuting Attorney

BENTON COUNTY
Office of County Clerk and
Ex-Officio Clerk of Superior Court
Filed for Record Sept. 22, 1969
LAURA BRADER, Clerk
By *Sue Bishop*, Deputy

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

THE STATE OF WASHINGTON,
Plaintiff,

v.

WILLIAM RABE,
Defendant.

No. 3123
JUDGMENT
September 22, 1969
EXECUTION DOCKET
Vol. 14 Page 449

The defendant, William Rabe, having been charged with the crime of Obscenity committed on the 29th day of August, 1968, trial having been held on the 2nd day of April, 1969, and the Court having made and entered Findings of Fact and Conclusions of Law, NOW, THEREFORE,

IT IS ORDERED, ADJUDGED AND DECREED that the said defendant, William Rabe, is guilty of the crime of Obscenity and that he be punished by being fined the sum of Six Hundred ($600.00) Dollars, and to pay the costs of this prosecution as the same may be hereinafter taxed.

DONE IN OPEN COURT this 19 day of September, 1969.

/s/ JAMES J. LAWLESS
Judge

Presented by:
/s/ CURTIS LUDWIG, Deputy
Prosecuting Attorney
Benton County, Washington

FILE
In Clerks Office
Supreme Court, State of Washington
Date 5/6/71
/s/ ORRIS L. HAMILTON
Chief Justice

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON,

Respondent,

v.

J. WILLIAM RABE,

Appellant.

[1] Obscenity—Seizure—Prior Adversary Hearing—Motion Picture. An adversary hearing prior to seizure of a single allegedly obscene motion picture is not required; however, the proceeding in obtaining the search or arrest warrant must be "designed to focus searchingly on the question of obscenity" when investigating the facts contituting the basis of the warrant, so as to avoid indiscriminate suppression of challenged material.

[2] Obscenity—Motion Picture—Partial Obscenity. Under proper circumstances movies which are obscene only in part may be constitutionally suppressed under state obscenity laws (RCW 9.68.010).

[3] Obscenity—Tests for Obscenity—Contextual Test—Motion Pictures. Although a motion picture or other publication might not be strictly obscene as appealing to a prurient interest, affronting contemporary community standards, and being utterly without redeeming social value, material can still be found to be obscene when examined under a contextual or variable test. In close cases, under the contextual test, the courts can consider the circumstances of production, sales, and distribution of the allegedly obscene material.

[4] Obscenity—Tests for Obscenity—Contextual Test—

Outdoor Theater. The display of a lewd and offensive film at an outdoor theater, which film fails to strictly meet the initial tests for obsenity, has the effect of repeatedly and unwillingly violating the right of privacy of residents of nearby homes to whom the pictures on the screen were clearly visible, and constitutes suppressible obscene material under RCW 9.68.010.

Finley, Hunter, Hale, and Neill, JJ., concur by separate opinion.

Appeal from a judgment of the Superior Court for Benton County, No. 3123, James J. Lawless, J., entered September 22, 1969. *Affirmed.*

Prosecution for exhibiting an obscene motion picture film. Defendant appeals from a conviction and sentence.

FILE
In Clerks Office
Supreme Court, State of Washington
Date 5/6/71
/s/ ORRIS L. HAMILTON
Chief Justice

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

THE STATE OF WASHINGTON, *Respondent,* v. WILLIAM RABE, *Appellant.*	No. 41365 En Banc Filed May 6, 1971

McGOVERN, J.—This is an appeal from a judgment entered upon the defendant's conviction of the crime of exhibiting an obscene motion picture film in violation of RCW 9.68.010.

Defendant managed an outdoor drive-in theater in the City of Richland. At the time of his arrest, he was exhibiting the motion picture "Carmen Baby" and had imposed no age restriction upon the paying audience. The picture screen of the outdoor theater was situated in such a way that it faced 12 to 15 adjoining family residences and a portion of a nearby major highway. Pictures upon the screen were thus visible to residents of those homes and their guests, to passing motorists upon the highway, and to those persons who would look at the screen from just outside the chain-link retaining fence enclosing the theater grounds.

August 28, 1968, a Richland police officer stood outside the theater fence and observed a portion of the film being

shown. The following night, from the same vantage point, the officer and the Richland city attorney viewed almost the entire film. On both occasions, teenage and younger children were observed by the officer to be watcing the motion picture from various points outside the theater fence.

Thereafter, the complaining officer appeared before a Richland justice of the peace and testified that he had observed the motion picture. He described some of the more objectionable scenes of the movie and informed the magistrate that teenage and pre-teenage children were viewing the picture from the periphery of the theater enclosure. Upon formal written complaint, a warrant for the arrest of the defendant was then issued and executed. As an incident to the arrest, and for evidentiary purposes, two reels of film of "Carmen Baby" were seized by the arresting officers.

October 3, 1968, defendant was convicted in the Richland District Justice Court of "wrongfully and unlawfully caus[ing] to be exhibited an obscene, indecent and immoral show" contrary to RCW 9.68.010.[1] He thereupon appealed to the Benton County Superior Court where following a trial de novo, he was again found guilty of the charge. The superior court did not conclude that the pic-

1. RCW 9.68.010 then provided:

"Every person who—

"(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

"(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

"Shall be guilty of a gross misdemeanor."

ture was obscene in its entirety, but rather that "Individual portions or scenes of the movie . . . are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves." It therefore concluded that the defendant was guilty of exhibiting an obscene movie and entered judgment accordingly.

On this appeal, defendant first argues that the seizure of the motion picture film for evidentiary purposes without a prior *adversary* hearing on the question of its obscenity constituted a prior restraint on his First Amendment right to freedom of speech. He contends that the rule announced in *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1968), is applicable here and that it requires a reversal of his conviction for the reason that the improperly seized film should not have been admitted in evidence against him. In *Metzger*, the court said, at page 204:

> The lesson of *Books* is that law enforcement officers cannot seize allegedly obscene publications without a prior adversary proceeding on the issue of obscenity. Such a seizure violates the First Amendment to the Constitution of the United States, and is a prior restrant condemned by the Supreme Court. In light of *Burstyn*, supra, *Kingsley Pictures*, supra and *Jacobellis*, supra these rules apply to motion pictures as well. Allegedly obscene publications or movies are not to be treated the same way as narcotics, gambling paraphernalia and other contraband.

Although numerous federal district and circuit courts have recently adopted the viewpoint that a prior adversary hearing must be afforded before an allegedly obscene motion picture may be constitutionally impounded (*Metzger v. Pearcy, supra; Astro Cinema Corp., Inc. v. Mackell*, 442 F.2d 293 (2d Cir. 1970); *Demich, Inc. v. Ferdon*, 426 F.2d

643 (9th Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F.2d 687 (3d Cir. 1969); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2d Cir. 1969); *Bongiovanni v. Hogan*, 309 F. Supp. 1364 (S.D. N.Y. 1970); *Carroll v. Orlando*, 311 F.Supp. 967 (M.D. Fla. 1970); *Natali v. Municipal Court of San Francisco*, 309 F. Supp. 192 (N.D. Cal. 1969) and cases cited therein), we, unlike those courts, are not persuaded that our nation's highest court requires an *adversary* hearing in every case before a film may be seized as evidence of an obscenity law violation.

The three decisions of the United States Supreme Court which consider in particular the question of whether a prior adversary hearing is constitutionally required are *Marcus v. Search Warrant of Property*, 367 U.S. 717, 6 L. Ed. 2d 1127, 81 S. Ct. 1708 (1961), *A Quantity of Books v. Kansas*, 378 U.S. 205, 12 L. Ed. 2d 809, 84 S. Ct. 1723 (1964) and *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636, 20 L. Ed. 2d 1313, 88 S. Ct. 2103 (1968).

In *Marcus*, the court found improper the seizure of approximately 11,000 copies of 280 different publications considered by the police to be obscene items. The officers were acting under a general warrant authorizing the confiscation of all "obscene" materials upon the defendant's premises. Mr. Justice Brennan merely noted the absence of a prior adversary hearing on the question of the obscenity of the items to be seized. Speaking for the majority, he considered in detail, however, the error of the magistrate who granted the police a search warrant without the aid of procedures "designed to focus searchingly on the question of obscenity." No publication had been submitted to the magistrate before he issued the warrant. The war-

rant constituted an unlimited authority to seize any publications which the officers in their discretion considered to be obscene. Although the court suppressed the seized material, it nevertheless distinguished that extensive and indiscriminate suppression of challenged publications from the temporary restraints upon selected publications which it had approved of in *Kingsley Books, Inc. v. Brown*, 354 U.S 436, 1 L. Ed. 2d 1469, 77 S. Ct. 1325 (1957).

Then, in *A Quantity of Books*, the police made another mass seizure, confiscating 1,715 copies of 31 novels found on the defendant's premises. An adversary hearing had not been held prior to the issuance of the warrant which authorized the seizure, but the judge who issued the warrant made a 45-minute ex parte examination of the materials to be seized, and the titles of the novels involved had been listed in the information filed by the prosecuting attorney. The procedure was held to violate the constitutional restrictions against abridgment of freedom of speech and press "since the warrant here authorized the sheriff to seize all copies of the specified titles, and since [the defendant] was not afforded a hearing on the question of the obscenity . . . before the warrant issued".

We disagree with the 7th Circuit *Metzger* decision and its progeny that *Marcus* and *A Quantity of Books* and *Joseph Burstyn, Inc. v. Wilson*, 343 U.S 495, 96 L. Ed. 1098, 72 S. Ct. 777 (1952), *Kingsley Int'l Pictures Corp. v Regents*, 360 U.S. 684, 3 L. Ed. 2d 1512, 79 S. Ct. 1362 (1959), *Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964), necessarily require a prior *adversary* hearing on the issue of obscenity before a *motion picture film* can be confiscated as evidence. In fact, *Burstyn, Kingsley Pictures*, and *Jacobellis* did not consider the

specific question of a prior adversary hearing. In both *Marcus* and *A Quantity of Books* the statute being enforced called for civil proceedings directly against the materials and for their eventual destruction. In both instances, the police impounded all of the allegedly obscene publications they found on the premises. Most crucially, the great amount and variety of materials sezied without sufficient judicial guidance created a substantial risk that non-obscene publications would also be suppressed. Certainly the scope and consequences of those seizures warranted the imposition of additional procedural safeguards. But the necessity for a prior adversary hearing is substantially less when as here, the seizure is limited to a single item, the detention is temporary, and the action is initiated only after a cautious judicial scrutiny of the sensitive issues involved.

The single pronouncement of the United States Supreme Court concerning the seizure of a motion picture film as evidence for an obscenity prosecution supports our interpretation of *Marcus* and *A Quantity of Books*. In *Lee Art Theatre*, the Supreme Court, on the authority of *Marcus*, reversed the conviction of the operator of a motion picture theater for possessing and exhibiting obscene and lewd films. The per curiam opinion noted, however, that the warrant had been issued solely on the basis of conclusory statements in the affidavit of a police officer and that the issuing magistrate had not inquired into the factual grounds for the officer's assertions. Because that process obviously failed to satisfy *Marcus's* demand for a procedure "designed to focus searchingly on the question of obscenity" the confiscation of the film was improper, and its introduction into evidence against the defendant necessitated a reversal of his conviction.

Significantly, the court did not suggest that the prior adversary hearing rule postulated in *A Quantity of Books* was applicable to the seizure of a motion picture film, even though it was obvious that the warrant was issued only after an ex parte proceeding. As noted in *Merritt v. Lewis*, 309 F. Supp. 1249, 1251 (E.D. Cal. 1970), "Whatever precedential value *A Quantity of Books* may have, its pre-seizure adversary hearing requirement is not yet applicable to motion picture cases." *Accord, Entertainment Ventures, Inc. v. Brewer*, 306 F. Supp. 802, 810 (M.D. Ala., N.D. 1969).

We agree with *Merritt* that the United States Supreme Court does not require a preseizure adversary hearing before an allegedly obscene motion picture can be confiscated for evidence. *Marcus* and *A Quantity of Books* suggest that such a hearing is constitutionally required only when a massive seizure of materials, apparently intended to suppress further dissemination of the contents, is effected through procedures insensitive to First and Fourteenth Amendment guarantees. As reemphasized in *Lee Art Theatre*, the primary test is whether the judicial inquiry leading to the seizure "focused searchingly on the question of obscenity" and was sensitive to the accused's freedom of expression.

Our examination of the record before us indicates that a clear and searching inquiry into the nature of the claimed obscenity of the movie was made by Justice of the Peace Albert J. Yencopal of Richland before he authorized the seizure of the film. The officer who testified before the court explained in detail some of the more distasteful and lewd scenes of the movie which were displayed upon the theater screen, and he discussed in general the balance of the

movie. We decline to set out here the narrative descriptions testified to by the Richland police officer. We are satisfied that the procedure followed in the justice court substantially complied with the preseizure mandates outlined in *Marcus, A Quantity of Books* and *Lee Art Theatre. See also, Bazzell v. Gibbens*, 306 F. Supp. 1057 (E.D. La. 1969), and *United States v. Wild*, 422 F.2d 54 (2d Cir. 1969). We conclude that the seized film "Carmen Baby" was properly admissible in evidence.

Defendant next argues that the trial court's conclusion of law that "Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves" is not legally sufficient under existing United State Supreme Court decisions to support the judgment of obscenity.

Considering the facts before us within the framework of the legal principles enunciated in *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967), and *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), we conclude otherwise. Those cases indicate that movies which are obscene only in part may be constitutionally suppressed under state obscenity laws when the movie is commercially exhibited in such a way that it intrudes upon the privacy of nonconsenting citizens who cannot as a practical matter avoid being exposed to the film.

The defendant here does not contend that "Carmen Baby" is totally devoid of obscene material and the record indicates that it is not. Defendant stresses instead that *Roth v. United States*, 354 U.S 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957), stands for the proposition that

items are not obscene unless "the dominant theme of the material taken as a whole appeals to prurient interest." Defendant argues, therefore, that the reliance by the trial court on isolated excerpts in determining the worth of the film's contents was erroneous. However, the analysis of the trial court did not have to be guided solely by the *Roth* definition. Although the court's findings and conclusions might have been better enunciated, we find that they sufficiently articulated a sound legal basis for the judgment.

We necessarily viewed the film and found it personally distasteful, offensive and devoid of social, philosophical or artistic merit. However, this court cannot enforce its personal tastes in the guise of law. We are charged with the duty of upholding our state and federal constitutions and of ensuring to each citizen the fullest exercise of the guarantees contained in those documents. When, as here, freedom of speech and press are challenged by efforts of the police to enforce our state obscenity laws, our resolution of the challenge must necessarily be guided by the United States Supreme Court's troubled and often confusing explication of what expression constitutes obscenity and what expression is entitled to the protective liberties of the federal constitution's First Amendment.

Unfortunately, that court's attempt in *Roth* to define obscenity *vel non* has continued to disappoint and confuse the courts, commentators and community alike. Subsequent opinions in explanation or modification of the initial *Roth* formula have revealed only a growing disharmony among the views of the Justices. We would concur with Justice Harlan's lament in *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676, 707, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968), that "The upshot of all this divergence in viewpoint is that

anyone who undertakes to examine the Court's decisions since *Roth* which have held particular material obscene or not obscene would find himself in utter bewilderment." The *Roth* definitional approach to obscenity is best summarized by Justice Brennan in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

> We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S., at 489. Under this definition, as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is uttelry without redeeming social value.

We have considered the film "Carmen Baby" with strict attention to those legal touchstones and assert that the dominant theme of the motion picture appeals to the prurient interest. The quantity and variety of sexual acts implied or expressly shown on the screen is out of proportion to its necessity or its part in the film's "theme". But *Jacobellis* and *Memoirs* emphasized that a work must also be *utterly* without redeeming social value in order to be proscribed by the state. Here, testimony at the trial elicited from several members of the Richland community was rather evenly divided on the question of whether the movie was offensive to the standards relating to sexual matters in that area and whether the movie advocated ideas or was of artistic or literary value. Thus, if we were to apply the

strict rules of *Roth*, the film "Carmen Baby" probably would pass the definitional obscenity test if the viewing audience consisited only of consenting adults.

However, we find that "Carmen Baby" is obscene when we consider, as the trial court did, the *context* of its exhibition. Our support for this holding is found in *Redrup v. New York, supra*, and in three 1966 United States Supreme Court decisions that inaugurated a "contextual" approach to materials not strictly definable as obscene.

In *Memoirs*, the Supreme Court reversed a judgment that the book "Fanny Hill" was obscene, primarily because the state court had minimized the social value element now incorporated into *Roth*. But Justice Brennan's opinion, characteristically joined only by Justices Warren and Fortas, also noted, at page 420:

> It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all circumstances . . . the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected.

This concern with the circumstances surrounding the dissemination was picked up in the companion case of *Ginzburg v. United States*, 383 U.S. 463, 16 L. Ed. 2d 31, 86 S. Ct. 942 (1966). There the "pandering" principle was engrafted upon *Roth*, and the defendant's conviction for mailing obscene materials was affirmed. In adopting what has been termed a "contextual" or "variable" approach, the court drew on the concurring opinion of Chief Justice Warren in *Roth*, when it said:

> We perceive no threat to First Amendment guarantees in thus holding that *in close cases evidence of*

> *pandering may be probative* with respect to the nature of the material in question *and thus satisfy the Roth test* . . . the fact that each of these publications was created or exploited entirely on the basis of its appeal to prurient interests strengthen the conclusion that the transactions here were . . . not sales of constitutionally protected matter.

(Italics ours.) *Ginzburg*, 383 U.S. at 474.

The same majority in *Mishkin v. New York*, 383 U.S. 502, 16 L. Ed. 2d 56, 86 S. Ct. 958 (1966), upheld a New York conviction for producing and possessing for sale obscene books that featured sadomasochism, fetishism and homosexual practices. Admittedly aimed at appealing to "a clearly defined deviant sexual group, rather than the public at large," the court interpreted *Roth* to support the suppression of materials directed at "the sexual interests of its intended and probable recipient group."

In these cases, the court offered a flexible "contextual" analysis to supplement the strict definitional requirements of *Roth*. In "close cases" where the elements of *Roth* as interpreted in *Memoirs* could not be satisfied, the court allowed the consideration of the circumstances of the production, sale and distribution of the alleged obscene material.

One year later in *Redrup*, the Supreme Court added two more bases which justify state control of arguably obscene materials. There, the per curiam opinion reversing three state obscenity convictions focused sharply on "contexts" where the method of distribution thrust offensive, but perhaps not constitutionally obscene materials, upon juveniles and an unwilling public.

> In none of the cases was there a claim that the statute in question reflected a specific and limited state

> concern for juveniles. See *Prince v. Massachusetts*, 321 U.S. 158; cf. *Butler v. Michigan*, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. *Breard v. Alexandria*, 341 U.S. 622; *Public Utilities Comm'n v. Pollak*, 343 U.S. 451. And in none was there evidence of the sort of "pandering" which the Court found significant in *Ginzburg v. United States*, 383 U.S. 463.

Redrup, 386 U.S. at 769.

We are satisfied that *Redrup's* emphasis on the preservation of individual privacy from the assault of offensive expression offers a reasonable and correct basis for our decision. The principal case relied upon by that court to support the privacy rationale, *Breard v. Alexandria*, 341 U.S. 622, 95 L. Ed. 1233, 71 S. Ct. 920 (1951), further delineated the scope of this contravailing right. In *Breard*, the court upheld a local ordinance requiring solicitors to obtain a homeowner's consent before entering the homeowner's premises. The claim of a magazine subscription salesman that the ordinance violated his First and Fourteenth Amendment freedoms of speech and press was denied when the court said that the guarantees of free speech and free press may not be misused to invade the privacy of one's home.

Then in *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970), *Redrup's* protection of the privacy of the home was expanded to include a university hallway. That judgment overturned a decision of a district court that the University of Massachusetts had violated the First and Fourteenth Amendment rights of one of its art instructors when it removed his controversial art display from the corridor walls of the institution. The district court had found that the

embarrassment and annoyance caused by the obscene paintings were not sufficient to warrant abridgement of the plaintiff's right of free speech. Balancing the interests of the plaintiff instructor against the rights of the users of the corridor, the court concluded that:

> Where there was, in effect, a captive audience, defendants had a right to afford protection against "assault upon individual privacy," *See* Redrup v. New York . . .

Close v. Lederle, 424 F.2d 988, 990 (1st Cir. 1970).

Thus the court affirmed the university's action. It also noted that the reasonableness of the university's action was bolstered by the fact that children regularly used that particular corridor where the offensive materials had been displayed.

We are satisfied that under the circumstances of this case the defendant was rightly convicted for exhibiting an obscene motion picture film. We find that the defendant's exhibition of an arguably obscene film in close proximity to the homes and highways of the Richland community posed more than an unreasonable annoyance to the public. The record places 12 to 15 private residences and a major thoroughfare within viewing range of the theater's screen. Considering the visual content and impact of many of the film's scenes, the defendant should have known that these residents and motorists would be repeatedly and unwillingly confronted with glimpses of lurid and deviant sexual conduct as they pursued their normal activities. As noted in *Landau v. Fording*, 245 Cal. App. 2d 820, 827, 54 Cal. Rptr. 177 (1966), *aff'd per curiam*, 388 U.S. 456, 18 L. Ed. 2d 1317, 87 S. Ct. 2109 (1967):

> the visual impact of a motion picture are distinguished from other media can [not] be disregarded. Films are obviously different from other forms of expression (*Freedman v. Maryland*, 380 U.S. 51, at p. 61 . . .) . . . Even in the absence of sound, movies assure a high degree of attention and retention . . .
>
> Because of the nature of the medium, we think a motion picture of sexual scenes may transcend the bounds of the constitutional guarantee long before a frank description of the same scenes in the written word.

See also, United States v. A Motion Picture Film Entitled "I Am Curious-Yellow", 404 F.2d 196 (2d Cir. 1968) and *Wagonheim v. Maryland State Bd. of Censors*, 255 Md. 297, 258 A.2d 240 (1969). To argue that the adjoining homeowners and motorists in the vicinity of the outdoor theater could have preserved their freedom to view what they pleased by drawing their curtains or averting their eyes is specious.

Redrup's reliance on *Breard* and *Pollak* suggests that an adjustment between the rights of the disseminator and the nonconsenting viewer should take into consideration the public or private nature of the encounter. Perhaps the passing public motorist, experiencing only a momentary shock and possessing the ability to avoid further embarrassment by proceeding on his journey, suffers an incidental intrusion on his privacy too minor to warrant official action. But the sanctity and immobility of the private residence suggest different considerations when the homeowner is affronted by lascivious conduct in the normal course of domestic activities. The right of the homeowner to be free from the intrusion of unsolicited offensive displays is obviously paramount to the outdoor theater manager's absolute discretion to choose what films he will exhibit to a

willing and unwilling audience. Within the confines of his own property, a citizen should be able to select what stimuli he and his children will encounter. And that right of privacy cannot be unreasonably curtailed by another citizen under the guise of freedom of speech and press.

Although this court has never declared whether there is an independent right of privacy in this state (*Lewis v. Physicians and Dentists Credit Bureau, Inc.*, 27 Wn.2d 267, 272, 177 P.2d 896, 899 (1947)), there can be little doubt after *Griswold v. Connecticut*, 381 U.S. 479, 14 L. Ed. 2d 510, 85 S. Ct. 1678 (1965), that the right of privacy is enshrined as a constitutional doctrine. *See* generally, W. Prosser, Law of Torts, § 112 (3d ed. 1964); 31 Law and Contemporary Problems 251-435 (1966); 64 Mich. L. Rev. 197-288 (1965). In *Griswold*, the United States Supreme Court held unconstitutional a Connecticut law prohibiting the use of contraceptives. Speaking for the majority (at 485), Justice Douglas found the law to be a destructive intrusion on the marital relationship, "a relationship lying within the zone of privacy created by several fundamental constitutional guarantees." Certainly the home lies within a "zone of privacy" which merits the protection of this court. And individual privacy is nowhere more entitled to protection than in the home.

We conclude that when a citizen's home is intruded upon by the unsolicited exhibition of lewd and offensive films, and there is no reasonable alternative to avoid viewing those films, such obtrusive displays violate that resident's "individual privacy" and his right to domestic solitude, and such display is contrary to RCW 9.68.010.

It may be beyond the scope of this decision to detail the

concern of this court for the welfare of the teenage and preteenage children who viewed this film from outside the theater fence. However, we note with approval that *Stanley v. Georgia*, 394 U.S. 557, 567, 22 L. Ed. 542, 89 S. Ct. 1243 (1969), reaffirms the states' duty to protect children from contact with obscene material. Because RCW 9.68.010 did not reflect "a specific and limited state concern for juveniles" when the defendant was prosecuted, *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967) could not support our affirmance of the conviction solely on the fact that children were known to be part of the "free" audience outside the fence. But RCW 9.68 has since been amended. Laws of 1969, Ex. Ses., ch. 256, p. 2383, now provide for age restrictions on the viewing of "erotic" films. *See Interstate Circuit v. Dallas*, 390 U.S. 676, 690, 20 L. Ed. 2d 225, 88 S. Ct. 1298 (1968); *Ginsberg v. New York*, 390 U.S. 629, 639, 20 L. Ed. 2d 195, 88 S. Ct. 1274 (1968). And it is apparent that such legislation means that future "close cases" of this type will be amenable to an even broader application of *Redrup* on the basis of a "specific and limited state concern for juveniles."

We believe that the approach taken here today represents the current thinking in the area of obscenity by the highest court of our nation and offers the fairest resolution of the conflicting interests here presented. We adopt the statement of Justice Stewart, concurring in *Ginsburg*, that:

> The First Amendment guarantees liberty of human expression in order to preserve in our Nation what Mr. Justice Holmes called a "free trade in ideas." To that end, the Constitution protects more than just a man's freedom to say or write or publish what he wants. It secures as well the liberty of each man to decide for himself what he will read and to what he will listen.

(Footnote omitted.) *Ginsberg*, 390 U.S. at 649.

The judgment and sentence of the trial court is affirmed.

/s/ McGovern, J.

We Concur:

/s/ Hamilton, C. J.
/s/ Rosellini, J.
/s/ Hale, J.
/s/ Ryan, J., Pro Tem

I Concur in the Result:

/s/ Neill, J.
/s/ Hunter, J.
/s/ Finley, J.

HALE, J. (concurring)—I concur except as to that part of the opinion which appears to say that material cannot be judicially held obscene unless *utterly* without social value (majority opinion, at page 12), as declared in *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.*, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 St. Ct. 975 (1966). Deciding whether the material has little or substantial social, literary, educational or entertainment value is difficult enough without trying to determine if it is *utterly* without it. After all, a seed catalog or a film travelogue can be readily converted into pornography while retaining some vestiges of social or other value. Even the filthiest, most depraved and obscene work, recognized instanter to be such by everyone of ordinary understanding, may be claimed to possess some spark of social value and thus cannot be judicially said to be *utterly* without it.

Although the Supreme Court of the United States, as is seen in the court's opinion, has the last word on freedom of speech, I think it has no jurisdiction whatever under the constitution—except perhaps for the District of Columbia

—to prescribe moral, literary or social standards for the country at large. The judicial duty to protect freedom of speech and press in the Nation at large imports no correlative power to preserve obscenity and pornography in the states. "[O]bscenity is not within the area of constitutionally protected speech or press." *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct. 1304 (1957). Accordingly, filth, whether "filth for filth's sake" or "filth for money's sake," (*State v. Jacobellis*, 173 Ohio St. 22, 28, 179 N.E.2d 777 (1962), *rev'd sub nom., Jacobellis v. Ohio*, 378 U.S. 184, 12 L. Ed. 2d 793, 84 S. Ct. 1676 (1964)), is not and should not be granted immunity from community and moral standards and state law except where to deny such immunity amounts to a deprivation of freedom of speech and press. Freedom of speech and press is not a commercial license for obscenity and pornography. Nor is obscenity and pornography protected by the commerce clause. That Congress and the federal courts do not bar the interstate transportation of filthy, obscene and pornographic movie film, does not, I think, prevent the states in their constitutional exercise of the police-power from prohibiting the public sale and distribution of such materials. This is so for the same reason that allowing contaminated or adulterated foods and druge and other consumable goods to move in interstate commerce does not override the fundamental power of the states to prohibit their sale and distribution. A different rule, I think, would constitute a direct attack on the ideas of self-government.

Holmes' aphorism that freedom of speech does not import the right falsely to shout "fire" in crowded theaters applies with equal force to pornography. Freedom of speech and press does not, I think, license the public use of

pornography and obscene materials in business, commerce, politics and government.

/s/ HALE, J.

HUNTER, J. (concurring in the result)—I concur with the result of the majority, but would go further and hold the film "Carmen Baby" to be obscene under the definitions of *Roth v. United States*, 354 U.S. 476, 1 L. Ed. 2d 1498, 77 S. Ct., 1304 (1957). That an exhibition of the film, even to consenting adults, would be in violation of RCW 9.68.010.

> We defined obscenity in *Roth* in the following terms: "[W]hether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest." 354 U.S., at 489. Under this definition as elaborated in subsequent cases, three elements must coalesce: it must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General, 383 U.S. 413, 418, 16 L. Ed. 2d 1, 86 S. Ct. 975 (1966).

It appears that the third element of the definition has caused confusion in the application of this definition.

I find no such problem. The definition should be considered in its entirety. The third element should not be considered in isolation of the remainder of the definition. If the material, taken as a whole, appeals to the prurient interest in sex, and is patently offensive because it affronts contemporary community standards relating to the repre-

sentation of sexual matters, then whether or not the material is utterly without redeeming social value, should be determined in the light of contemporary standards of the community.

Because there may be some in a community who disagree with the contemporary standards and, in their opinion, deem the material to have some redeeming social value, does not by itself remove that material from the definition of obscenity.

In the instant case the film "Carmen Baby" was exhibited to this court. It became undisputed evidence in the case. Therefore, this court is in as favorable a position as the trial court to make a valued judgment and independent judicial determination as to whether this film is utterly without redeeming social value.

To detail the repulsive, errotic [sic], pornographic scenes that dominate the entire theme of this film is unnecessary to this opinion. The majority unhesitatingly state:

> We necessarily viewed the film and found it personally distasteful, offensive and *devoid of social*, philosophical or artistic merit.

(Italics mine.)

Why then should the opinion of some witnesses in the record modify the opinion of the members of this court. To do so unqualifiedly would be to allow their usurpation of a judicial function.

This court must make the final determination as to whether the film "Carmen Baby," the undisputed evidence in this case, comes within the *Roth* definition and is obscene. Unquestionably the dominant theme of the film appeals to the prurient interest in sex. We can take judicial

notice that it does affront contemporary community standards. Applying these standards, it is utterly without any redeeming social value.

This court therefore should, without equivocation, hold that the film is obscene, and any exhibition thereof, even to consenting adults, is in violation of the statute, RCW 9.68.010, *supra*.

/s/HUNTER, J.

FINLEY, J. (concurring in the result)—I have some lingering reservations as to the constitutionality of the procedure employed in seizing the questioned film—*i.e.*, the lack of a prior adversary hearing on the question of obscenity. I nevertheless concur in the result reached by the majority on the ground that exhibition of the film "Carmen Baby" under the specific facts of this case—*i.e.*, in a location unrestrictedly frequented by juveniles—does not fall within the constitutional protection of the first amendment to the United States Constitution. Furthermore, in my opinion, the facts surrounding exhibition of the film "Carmen Baby" in the case before us support a finding of pandering on the part of the appellant as to those minors who actually viewed the film.[1] It is obvious from the record that the appellant made no attempt to restrict viewing of the film by juveniles immediately outside the chain link fence. Such inaction was potentially an economic benefit to appellant in serving to attract juveniles to become pay-

1. Pandering may be found to exist, as I understand the relevant federal cases, when the questioned material is "created or exploited entirely on the basis of its appeal to prurient interests . . ." *Ginzburg v. United States*, 383 U.S. 463, 474, 16 L.Ed.2d 31, 86 S. Ct. 942 (1966). Where the relevant evidence supports a finding that a solicitor's or exhibitor's actions amount to pandering, *"such evidence may support the determination that the material is obscene even though in other contexts the material would escape such condemnation."* (Italics mine.) *Ginzburg*, 383 U.S. at 476.

ing customers and with a somewhat logically predictable result the juveniles as "free" customers would, by word-of-mouth, attract additional paying customers.

It appears to me that, perhaps, the majority assumes too much in applying, or, possibly, in attempting to extend the application of, the contextual or variable approach developed in *Redrup v. New York*, 386 U.S. 767, 18 L. Ed. 2d 515, 87 S. Ct. 1414 (1967), and *Close v. Lederle*, 424 F.2d 988 (1st Cir. 1970). Namely, the facts of the instant case do not, in my opinion, support the finding of an assault upon individual privacy "in a manner so obtrusive as to make it *impossible* for an unwilling individual to avoid exposure to it" such as described in *Redrup* and *Close*.

While I can agree with, and would support, application of the "contextual" approach in an appropriate case, as I read the record before us, it is silent or lacking as to any complaints actually made by motorists or residents of the area, and thus there seems to be no indication that, in fact, *the individual privacy of any homeowner or passing motorist was assaulted*. Decisions of the federal courts in the area here involved seem to me to indicate that the First Amendment rights cannot be circumscribed absent clear proof of an *actual assault* upon the rights of a nonconsenting individual.

Finally, in terms of the foregoing, it appears to me the rationale of *Redrup* and *Close* may be somewhat misapplied in the following passage from the majority opinion:

> The right of the homeowner to be free from the intrusion of unsolicited offensive displays is obviously paramount to the outdoor theater manager's absolute discretion to choose what films he will exhibit to a willing and unwilling audience.

It is my feeling this statement would be more appropriate if there had been complaints or were this an action for nuisance brought by offended homeowners. This particular language in this case does not, in my opinion, sustain censure of the film absent proof of actual assault upon the privacy of a specific individual.

In any event, for the reasons stated, I concur in the result reached by the majority.

/s/ FINLEY, J.

I concur

/s/ NEILL, J.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

PART II.

Portions of State Court Record Relating to Questions Sought to be Reviewed

IN JUSTICE COURT

Richland District, Benton County, Washington

THE STATE OF WASHINGTON
vs.
JOHN DOE

No. 2169

CRIMINAL COMPLAINT

For OBSCENITY R.C.W. 9.68.010

Before me Albert J. Yenconal, a Justice of the Peace, in and for the said County, this day personally appeared W. H. GORDON who, being first duly sworn, on oath complains and says: That on the 29th day of August, 19.68, at Richland in the County of Benton and State of Washington JOHN DOE did wrongfully and unlawfully cause to be exhibited an obscene, indecent and immoral show,

contrary to the form of the Statute in such cases made and provided, against the peace and dignity of the State of Washington.

Wherefore said complainant prays that the said defendant JOHN DOE may be arrested and dealt with according to law.

W. H. Gordon

Subscribed and sworn to before me this 30th day of August, 19.68.

Albert J. Yenconal
Justice of the Peace in and for said County.

IN JUSTICE COURT, RICHLAND PRECINCT, BENTON COUNTY, WASHINGTON, BEFORE HON. ALBERT J. YENCOPAL, JUSTICE OF THE PEACE

STATE OF WASHINGTON, *Plaintiff,* v. JOHN DOE, *Defendant.*	No. 2109 HEARING August 30, 1968

This matter having come before the undersigned upon the request of W. H. Gordon, Sergeant of the Richland Police Department to determine whether there is probable cause to issue a John Doe warrant upon either the manager or the motion picture project operator of the Park In Y Theater, situated in Richland, Washington, and to arrest him for showing an obscene, indecent and unnatural show; and the Court having sworn in the said Sgt. Gordon, the following is a colloquay [sic] between the Court and said Sgt. Gordon:

Q. What is the name of the show?

A. Carmen Baby

Q. Did you personally see the movie on the night of August 29th, 1968?

A. Yes.

Q. Did you see all of the movie?

A. Most of it.

Q. Did you see any portion of the movie on some other night?

A. Yes, approximately 20 minutes on August 28th, 1968.

Q. Did you stop to see the movie?

A. I was making a routine patrol on the west side of the

theater when my attention was called to a very lewd scene.

Q. Upon what do you base this,—I mean, tell me what you saw.

A. The scene was a young man lying on the bed nude from his waist up and the girl sitting on the bed in a revealing black slip. This girl started fondling the young man and he was going through great emotional stress according to the features on his face. She sat up on the bed and removed her panties, dropped the panties across the young man's mouth and proceeded to kiss him violently through the panties on the mouth. The young man's emotions were greatly aroused and the girl kissed him on his breast, and her head slowly moved as she kissed him on his middle and then her head disappeared from view. The rest of the scene was shots of the emotions on his face, as he apparently reached a climax as her finger moved in and out of his ear.

Q. Where there other scenes of unnatual emotions?

A. On Thursday night the City Attorney Tom Heye and I observed most of this picture. Other scenes depicted a very attractive young woman sitting with her back against the wall in a revealing slip. Another young woman fondled her, and her head slipped down across her breast until her head disappeared, and the scene depicted the emotions on her face, showing that she apparently reached a sexual climax.

It was observed by Mr. Heye and myself that there were several young teenage children watching this film from around the fence, ages of about 11 to 14, and some younger at the back street I believe called Geneva Street.

Q. How old are you Sgt. Gordon?

A. 53 years old.

Q. How long have you been a police officer?

A. 27 years, almost 25 years with the Richland Police Force.

Q. Do you have any children?

A. Yes, I have four grown children.

Upon the testimony heard by the Court, there is probable cause to issue the John Doe warrant.

DONE By The Court this 30th day of August, 1968.

/s/ ALBERT J. YENCOPAL
Justice of the Peace

STATE OF WASHINGTON, }
County of BENTON } ss. In Justice Court RICHLAND PRECINCT ~~DISTRICT~~ District,

TO THE SHERIFF OR ANY CONSTABLE OF SAID COUNTY:

WHEREAS, W. H. GORDON has this day complained in writing, under oath, to the undersigned, one of the Justices of the Peace in and for said County, that on the 29th day of August, 19 68, in said County and State, JOHN DOE

did commit the crime of obscenity, RCW 9.68.010

Therefore, in the name of the State of Washington, you are commanded forthwith to apprehend the said JOHN DOE and bring him before me to be dealt with according to law. Bail is fixed at $ 300.00

Given under my hand this 30th day of August, 19 68

Justice of the Peace

IN JUSTICE COURT, RICHLAND PRECINCT, BENTON COUNTY, WASHINGTON, BEFORE HON. ALBERT J. YENCOPAL, JUSTICE OF THE PEACE

STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.*	No. 2109 MOTION TO SUPPRESS EVIDENCE AND DISMISS CHARGE

COMES NOW the defendant, William Rabe, by and through his attorneys, Critchlow, Williams, Ryals & Schuster, and moves the court for an order suppressing as evidence the film "Carmen Baby", which was seized by the Richland Police Department and further moves that the charge brought against the defendant, based on this evidence, be dismissed. The basis for this motion is set forth in the brief submitted herewith.

DATED this 18 day of September, 1968.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Attorneys for Defendant
By: REMBERT RYALS

IN JUSTICE COURT, RICHLAND PRECINCT, BENTON COUNTY, WASHINGTON, BEFORE HON. ALBERT J. YENCOPAL, JUSTICE OF THE PEACE

STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.*	No. 2109 NOTICE OF APPEAL

TO: Justice of said Justice's Court, and

TO: Herbert E. Davis, Prosecuting Attorney of the County of Benton, State of Washington:

TAKE NOTICE that the defendant, William Rabe, in the above-entitled action hereby appeals to the Superior Court of the State of Washington, in and for the County of Benton from the judgment and sentence herein made and entered in said Justice's Court on the 7th day of October, 1968.

DATED: This 7 day of October, 1968.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Attorneys for Defendant, Appellant
By: REMBERT RYALS

Copy received this 8th day of October, 1968.

/s/ CURTIS LUDWIG
CURTIS LUDWIG, Deputy Prosecuting Attorney

Notice of Appeal

STATE OF RHODE ISLAND AND
PROVIDENCE PLANTATIONS

Providence, Sc. SUPERIOR COURT

JOSEPH C. SCUNGIO, et al, Members of
THE BUREAU OF LICENSES
v.
COLUMBUS THEATER, INC.

C.A. 67-4565

Heard before: Mr. Justice Bulman
November 20, 21, 22,
24, 27 and 28, 1967.

APPEARANCES

Vincent Piccirilli, Esq.
Robert McOsker, Esq. .....Plaintiff
Milton Stanzler, Esq. .....Defendant

Tuesday, November 28, 1967

BULMAN, J. Decision here for the defendant and judgment will enter. I always give my decision first so lawyers won't sit and wonder, while I'm thinking out loud for five or ten minutes giving the reasons, what the decision will be.

Gentlemen, this has been a well-tried case: Mr. McOsker, Mr. Piccirilli, and Mr. Stanzler. It was not an easy case to sit here and listen to because it's not the kind of case a Judge can really get hold of and squeeze something out of—all the expert testimony, as I have characterized it, is like a handful of marshmallow fluff—you squeeze it a little bit and it slides out between your fingers.

I am not in this decision going to take any great amount of time or say anything about the film which might constitute free advertising for Mr. Berberian. The film is trash and it doesn't deserve advertising from the Court. The

plaintiff's burden here was to establish by a fair preponderance of the evidence that this film, "Carmen Baby," is obscene in the constitutional sense and "in the constitutional sense" refers to what the U. S. Supreme Court right up to the last determination has declared to be obscene. They have given us some guidelines. Based on all the evidence for the plaintiff and the defendant, and not discounting my own view of the moving picture, which I consider as real evidence here, I'll echo a little bit of what Mr. Justice Brennan is supposed to have said back in one of the recent cases, it was in the Ohio case, *Jacobellis against Ohio*, 378 U.S. 184. He didn't attempt to define hard core pronography. It was no easy matter, but he said "I know it when I see it, and the motion picture involved in this case is not that." I say the same about this one. I think I would recognize hard core pornography and this movie is not that. It may come fairly close, at least in some of the scenes it's pretty gamy; as a matter of fact, "dirty." You know, that "panty scene," that goes beyond customary limits, I think; with all the deference to the Yale professor who said only that it gets pretty close to the outer limits. That one scene, taken alone, is offensive by any standard, but I can't condemn the film on that scene alone. It should be noted that new contemporary standards are established as we go along, and that might be one scene which would become a basis for a new and more offensive contemporary standard in the future, but that's not before me.

Be that as it may, on the three criteria which I must apply here, and which I did apply in reaching the decision I did, I find that this film has plenty of prurient appeal, so to speak, but I'm not satisfied the plaintiff has established by a fair preponderance of the evidence that

the dominant theme in that area exceeds what the U. S. Supreme Court has said to be legally permissible, and the same as to contemporary standards. It's pretty gamy, and there are certainly some scenes which, to borrow the phrase used by Professor Lawder, might be close to the "outer limits of candor" or even go beyond them. But there again, taken as a whole, the City has not proven that it is offensive, patently offensive to contemporary community standards.

Finally, on the third of the three criteria, "utterly without redeeming social value," when the U. S. Supreme Court overturned a decision by the Massachusetts Supreme Judicial Court and said that the Massachusetts Court was wrong in using the words "substantially without redeeming social value;" the standard we set here in Washington for the entire country is "*utterly* without redeeming social value." I can't say after having listened to all the experts for the plaintiff and for the defendant and having viewed the film, that it is "*utterly* without redeeming social value." As far as the method of advertising goes, I don't think it achieves the requisite "pandering" quality that the Supreme Court had in mind when they decided against Ginzburg. It might get a little close, but actually there is not a great deal of difference between the New York Times ad and the Providence ad. Just one quote is taken out, the rest of the stuff is there. The picture of the girl might be offensive to some people—just that picture, considering the type of activities portrayed in the film—but the City has not carried its burden in this case, either.

I found out quite a while ago—well, not quite a while ago, I have only been up here three and a half years—some cases you decide because you have a feeling for

them. This is one of them. My feeling is that the plaintiff hasn't carried the burden of proof. I'm not satisfied that the plaintiff has established his case. I can't be a censor, I'm not the guardian of the morals of a community, and I must take the law from the U. S. Supreme Court as they give it to me.

I find as a fact that the City has not carried its burden of proof as to any of the requisite criteria, including pandering, and so has failed to establish obscenity of the film itself or its method of advertising.

I conclude that no injunction can issue.

One thing in passing, Judge Jacob of Connecticut, in a very interesting article on the controlling of obscenity in Connecticut in the June, 1967, Connecticut Bar Journal, concludes with this short paragraph: "It is submitted that the Connecticut definition of obscenity based on Roth is no longer adequate. The Roth test has been strengthened and revamped. It will be more difficult to find material which meets the standards." I think that well expresses the current situation. By the way, gentlemen, you're both here in Court. Since no injunction will issue, judgment for the defendant will be entered immediately and time to take any corrective measures in an appellate court runs from today, without further notice.

Let me add to the decision: having decided as I have, I don't get to the constitutional questions raised in defendant's answer.

CERTIFICATION

I hereby certify that the preceding pages, 1 through 4 inclusive, are a true and accurate transcript according to my stenographic notes.

ANNA BODNAR

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, HUDSON COUNTY
DOCKET NO.

VAN CURLER BROADCASTING CORP., *Plaintiff*, v. WILLIAM MUSTO, et al, *Defendants.*	Civil Action TRANSCRIPT OF PROCEEDINGS

Friday, June 28, 1968
Hudson County Courthouse,
Jersey City, N. J.

BEFORE:

The Honorable ROBERT A. MATTHEWS, J.S.C.

APPEARANCES:

Messrs. STRYKER, TAMS & DILL
By: JOHN J. MONIGAN, Jr., Esq. for the Plaintiff.

EDWARD J. LYNCH, Esq., Corporation Attorney, City of Union City

JOHN DREWEN, Esq., Of Counsel for the Defendants.

SAMUAL VANDER VALK
Official Court Reporter

MR. MONIGAN: If your Honor please, this matter is before the court on an application on behalf of the defendants to vacate a temporary restraint which was contained in an order of this court granting an order to show cause dated June 26, 1968.

The original application was based upon a seizure of the film "Carmen Baby" under circumstances which the plain-

tiffs contended violated their constitutional rights because there had been no judicial determination which was required by the decisions of the court with which—the Supreme Court of the United States—with which the court is familiar; those being the cases which hold that a movie is entitled to the protection of the First and Fourteenth Amendments of the Constitution of the United States, and particularly the case of Jackobellis [sic] against Ohio, 378 U. S. 184, and Joseph Burstyn, Inc. against Wilson, 343 U. S. 475 (1951), and Freedman against Maryland, 380 U. S. 51.

Now, after the order to show cause with the temporary restraint was granted, this application was made to vacate the temporary restraint, and with the consent of counsel the court viewed the film last evening, and after a conversation in chambers which had occurred the position of the plaintiff was that it would consent to a determination by your Honor at the present time as if this matter were coming on final hearing, with the submission of the complaint which was filed in the United States District Court which led to a judgment of that court that the ordinance which was originally the vehicle for the City of Union City to proceed was unconstitutional because of the definition and various other provisions in that ordinance.

The present proceedings which led to the seizure was I believe made by a complaint to the magistrate, and the film was seized in that connection.

Now, so far as the aspect of the matter which would be regarded as a final hearing on the plaintiff's application for a permanent injunction, it has been agreed that a copy of the complaint in the United States District Court proceeding with its accompanying affidavit would be marked in

evidence, I believe over the objection of counsel for the defendant. Is that so?

MR. DREWEN: Over objection, yes.

THE COURT: It may be marked.

MR. DREWEN: Object to it as incompetent, irrelevant and immaterial.

(EXHIBIT P-1, COMPLAINT IN UNITED STATES DISTRICT COURT PROCEEDING, IS RECEIVED IN EVIDENCE.)

MR. MONIGAN: On the issue of contemporary standards as being one of the guiding tests which is applied to obscenity matters, we would like also to submit that an offer of proof, that one Luis Pesce, who was formerly a chairman of the State of New York Board of Censorship, which no longer is in operation, would testify that in his opinion as an expert, which qualifications he abundantly possesses, would testify that in his judgment judged by the applicable standards of the United States Supreme Court decisions, that "Carmen Baby" was not obscene.

We make a similar submission—oh, Mr. Pesce testified in the adversary proceeding in Providence, Rhode Island, which led to a conclusion that the film was not obscene there.

Also we would submit on final hearing the testimony, to like effect, by the head of the Yale School of Drama, Motion Picture Division.

I shan't burden the court with an argument upon the law and the applicable standards, nor shall I presume to cite all the cases which I think—with which everybody is familiar. If your Honor wants me to cite them, I shall.

THE COURT: Well, I want to know which ones you are relying on.

MR. MONIGAN: All right. The leading case is, of course, that of Roth against United States, 354 U. S. 476. It is from that decision which we first have the articulation that whether to the average person applying contemporary community standards the dominant theme of the material taken as a whole appeals to prurient interest.

That decision has been further refined by the decision of the Supreme Court in Memoirs against Massachusetts, 383 U. S. 413 which even more restrictively articulated the Roth concept as requiring the existence of three elements.

Mr. Justice Brennan, speaking for the court, in the only opinion in which there was a sufficient concurrence of judges, said under this definition as elaborated in subsequent cases three elements must coalesce. It must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value.

The fact that motion pictures are the beneficiaries of the constitutional privilege of the First and Fourteenth was the subject of the cases that I cited to your Honor at the beginning of this opinion.

The most recent development in the line of these obscenity cases occurred on April 22, 1968, save for one case which I will refer to later, and those are Teitel Film Corporation against Cusick—the official citation is not yet available—it's 88 Supreme Court 754—and Ginsberg against

State of New York, and Interstate Circuit, Inc. against Dallas; numbers 47 and 56 and 64 in the '67 Term.

The per curiam opinion in Redrup, which I have just mentioned, is valuable simply for a resume of the divergent views of the members of the court; and more recently there were a number of decisions of the Supreme Court, all of them memorandum opinions, all of them are contained in 388 U.S., and they are Tannenbaum against New York, 388 U. S. 439; Jacobs against New York, 388 U.S. 431, 87 Supreme Court 2098, case number 2, and a number of additional memorandum decisions which I shan't burden the record with. They simply reiterate the divergent views of the court, of the members of the court, as has been expressed in the cases already cited.

In that posture of the matter, your Honor, there remains only for purposes of the record a decision of the Supreme Court on June 18, 1968, in Lee Art Theater against Virginia, which was number 997 of the 1967 Term. It's reported in 36 Law Week 3480. However, that last cited decision has really no particular pertinence at the present posture of this matter because we have passed the question of the seizure before adjudication.

So that based upon those matters and taking into consideration the decisions and your Honor's own conclusions on the basis of the viewing of the film, it is the submission of the plaintiff that clearly the film "Carmen Baby" does not have the coincidence of the three mandatory requirements which have been enunciated in Memoirs, and for that reason the temporary restraining order already granted should take the form of a final injunctive order directing the defendants and each of them to return the print of the

film "Carmen Baby" as prayed in the complaint and to cease and desist from further interfering with the show of the or exhibition of the film "Carmen Baby" at the Lincoln Theater in Union City.

THE COURT: Why do you say that?

MR. MONIGAN: I'm sorry?

THE COURT: What do you base you conclusion on? Let's get into the facts. You saw the film too.

MR. MONIGAN: I did, your Honor.

THE COURT: You sat two seats away from me.

MR. MONIGAN: Thats right.

THE COURT: Why? Why did you come to this conclusion?

MR. MONIGAN: The film, as your Honor knows, perhaps better than I, has the almost identical libretto as Bizet's "Carmen," and the dialogue, as your Honor will recall, was pretty much identical with the libretto.

THE COURT: In spots.

MR. MONIGAN: In spots, yes. The theme of the film was such as to indicate that the principles of usual moral concepts at least which were palatable in the nineteenth century at the time of the showing of "Carmen" first in Paris were still viable. That is to say, evil was punished, and there did seem to be almost no virtue that I was able to discover in the film, but presumably it was rewarded in the sense that it was not the subject of any discussion.

The community standards which are required to be applied to the film, as your Honor knows, our [sic] national standards. The picture was in technicolor. There were a number of pictures of harbour scenes and cabaret scenes

and the central squares and countryside, and so forth, which must be considered as part of the general context of the film, because the standard as viewed in its continuity totality of continuity, is its basic appeal to the prurient interest in sex.

THE COURT: That was covered by the other scenes.

MR. MONIGAN: The other—

THE COURT: The ones you haven't mentioned.

MR. MONIGAN: The scenes which were displayed in the film were different from scenes which would be regarded as tolerable by general community standards some years ago, in the same fashion that the books which have been adjudicated as not being obscene by present-day community standards would be unthinkable except in a very restricted audience some years before.

So far as the present clinical absorption with scenes and descriptions of sexual activites which currently inhabit all of the contemporary novel themes, there has been a departure certainly from those days when it used to be said obscenity rather than the actual expression, and so that the degree of community standards or the acceptance of community standards at the present time so far as the existence of bedroom scenes, of which there were several in the film, are not remarkable by present-day standards because they are a commonplace subject of rather detailed clinical reporting in almost all the books that one reads nowadays.

But whether indeed the concept of obscenity is one which can be precisely defined, it seems perfectly evident the Supreme Court has had a difficult time formulating the concept, and the matter really I submit depends upon a

sophisticated approach to what is protected under the First and Fourteenth Amendments to the Constitution of the United States.

THE COURT: I think we can start out by saying all expression is protected.

MR. MONIGAN: All. Right. Now, we have that rather vague one: utterly without redeeming social value.

Utterly without redeeming social value seems an interesting formulation and can I think correctly be considered to apply only in those situations where there is absolutely no rhyme or reason for the portrayal of the activities which are portrayed other than a simple sex-for-sex-sake in totality.

I don't know whether there is any—we can say I think quite clearly what we—although the courts have had trouble with it—there are some sort of things which I think everybody would agree are hard-core pornography, although we would be perhaps somewhat pressed to say, to articulate a general definition of it.

THE COURT: French postcards. Filthy movies.

MR. MONIGAN: Yes. Filthy pictures. That sort of thing, yes.

Now, this film "Carmen Baby" had a good deal more to it than that. So far as the story line is concerned, it had—certainly it would not by any sensible standards suggest to anyone that Carmen was the sort of young lady that a, or a young person, that a sensible person would have anything to do with.

Indeed, the degree of difficulty presented by all who came in connection with her would certainly suggest the

sensible moral theme, that Carmen was not a person to emulate.

The situation of—the fact that she was a prostitute is a common factor—common story theme. The one perhaps relevant question, relevant issue on the question of obscenity, is how was that theme portrayed. Carmen was portrayed in this film as a—and perhaps—so far as anything that I observed in it, she had no redeeming features, except momentarily perhaps the idea that she did want to alter her change of life, or her state of life, and did not adhere to those decisions.

The ingenuousness of the hero or tragic figure in it was certainly difficult to accept as a story line. But again the story line was the same story line as existed before.

In short, our submission is that the only difference really in the film "Carmen Baby" and the opera is that the things which were clearly assumed to exist in the opera and which did not take place on the opera stage were displayed on the screen.

There is no question that the characters were virtually the same. The relationship between the characters were the same. The only difference was, as I have said before—

THE COURT: No bull fights.

MR. MONIGAN: Yes. And we have—and again judging by contemporary standards—we have progressed or retrogressed through the developments of Carmen, that we had the matador as the hero figure; then your Honor will recall that we had, during 1942 or so, we had a prizefighter who was the substitute for the toreador; and now we have a folk singer who takes the place of the heavy attraction.

So whether the film is one which any of us would have gone to see had not this litigation made it necessary or appropriate to do is I think besides the point.

I think that the question is, in your Honor's considered judgment, viewed as he is obliged to view these things, compelled to the conclusion that this film is so utterly in totality without any value other than appealing to the prurient interest in sex, that the teaching of the cases is such that the conclusion of this court should be that "Carmen Baby" is entitled to this constitutional safeguard.

THE COURT: Judge Drewen.

MR. DREWEN: May it please your Honor, I shall be very brief. Mr. Monigan has taught me that I should not embark upon any discussion of the picture.

THE COURT: You didn't see it.

MR. DREWEN: Pardon?

THE COURT: You didn't see it. I would suggest that you do not.

MR. DREWEN: May I proceed?

THE COURT: Yes.

MR. DREWEN: Our courts have defined obscenity, which is the subject matter of your Honor's judicial determination. The definitions in the Roth case and in other cases are clearly well known and understood by your Honor, and your Honor has seen the picture, and we await judgment thereon as required by the law in the premises.

THE COURT: Why do you say this picture is obscene?

MR. DREWEN: What is that?

THE COURT: Why do you say it's obscene?

MR. DREWEN: I say it's obscene because of what they

say about it themselves in the moving papers in the Federal court, for one thing.

THE COURT: Have you ever read James Joyce's "Ulysses"?

MR. DREWEN: Sir, yes.

THE COURT: That was made into a motion picture.

MR. DREWEN: I don't know. I never saw it.

THE COURT: James Joyce's "Ulysses" is held to be a work of art.

MR. DREWEN: It may have been. I don't know. Whether or not a matter is, a creation is a work of art, and also something else, is a very profound question.

THE COURT: That's the old problem of art and prudence, isn't it?

MR. DREWEN: That's right.

THE COURT: And that's the problem for the artist. Is it not?

MR. DREWEN: Aren't we going afield here?

THE COURT: Why?

MR. DREWEN: No? Now, with regard to the—

THE COURT: Well, you're going to exclude the artist from the community, aren't you?

MR. DREWEN: It will depend upon who the artist is. Maybe he ought to be excluded.

THE COURT: But we aren't fascists.

MR. DREWEN: Pardon?

THE COURT: We aren't fascists.

MR. DREWEN: Of course not. That is another subject entirely. We are not dealing with that.

THE COURT: Well, then, how do we exclude him?

MR. DREWEN: How do we exclude him? In the manner in which you Honor intended when you used that word.

THE COURT: By due process of law.

MR. DREWEN: Yes.

THE COURT: And what happens to our society if we exclude the artist?

MR. DREWEN: I don't know.

THE COURT: One of the arguments that is being made about our current life is that it's being dehumanized.

MR. DREWEN: Being what?

THE COURT: Dehumanized.

MR. DREWEN: No. It's not being dehumanized. I think the Pope has the right idea, that it's being depersonalized.

THE COURT: Well—no comment.

MR. DREWEN: All right. Now, with regard to the—

THE COURT: That was a low blow.

MR. DREWEN: With regard to the offer of the complaint in the Federal case, it's incompetent, and that's all I'll say about it, and has no place as proof in any sense on this inquiry. An individual film is an individual case, and there can be no reference to other decisions on other cases without getting away from the problem before us.

There was no search here and no seizure here and no execution of any warrant here, and the case of Lee Art Theater has no application because—

THE COURT: Oh, I beg to differ with you. There was a seizure here.

MR. DREWEN: There what?

THE COURT: There was a seizure.

MR. DREWEN: No. The officers say that there was no objection to their taking the film away as evidence, which it was their duty to do, by the way. No police officer can see a man put a gun in his pocket and let him walk away with it.

THE COURT: Yes, but somebody made a judgment he shouldn't have made.

MR. DREWEN: How?

THE COURT: Somebody made a judgment that he shouldn't have made.

MR. DREWEN: In what connection? What is your Honor's specific reference?

THE COURT: Well, you're talking about a gun going into a pocket, and I immediately leaped to the conclusion that the officer decided that there was a crime being committed in his presence.

MR. DREWEN: Yes.

THE COURT: Which meant that there was an obscene picture available, and I suggest the officer is incompetent to make that decision.

MR. DREWEN: Well, he is not incompetent to make the decision when he acts upon his own judgment which is the only thing that he can do under the circumstances.

THE COURT: But Marcus against the Search Warrants and Lee Art Theater against Virginia say that that cannot be done.

MR. DREWEN: But what those cases say is that it cannot be done, but in this case it would not have been done if

this proceeding had not interfered with the proceedings before the magistrate. Nobody was arrested here. A warrant was served—a summons, rather, was served, of these proceedings before the magistrate two or three days hence for the purpose of determining the question that is now before this court.

THE COURT: The Supreme Court says that's too long to wait.

MR. DREWEN: I don't know of any case that says that two days is too long to wait.

THE COURT: You said three before.

MR. DREWEN: Pardon?

THE COURT: You said three. Fifty-eight hours was held to be too long in one case.

MR. DREWEN: Well, this is 48 hours.

THE COURT: Oh, I misunderstood you. I thought you said 72.

MR. DREWEN: No. We're within the—

THE COURT: Well, as you said, the other cases are irrelevant. We're only interested in this one.

MR. DREWEN: The question of returning the print, of course, begs the question, because if this is obscene there is no obligation to return it.

I have nothing further to say, your Honor.

THE COURT: What do you suppose the Supreme Court means when it says that material cannot be proscribed unless it is found to be utterly without redeeming social value?

MR. DREWEN: Is your Honor asking me a question?

THE COURT: Yes. What do you suppose they mean? Utterly without redeeming social value.

MR. DREWEN: I suppose they mean what they say.

THE COURT: I suppose so too. But what do you suppose they mean?

MR. DREWEN: All you want me to do is to supply a different set of words to take the place of those that you've just uttered by the way of quoting the court.

Utterly means completely. And redeeming is to save. Social value is a very vague term that I can't begin to deal with on this occasion, exhaustively.

THE COURT: All right. Suppose I were to tell you of a motion picture which opens up—you may be seated—with a shot of some city or wharf town in Italy, shows a young lady finally come out of a store, and she is generously endowed, although not overgenerously—

MR. DREWEN: Endowed with what?

THE COURT: Everything that a young lady should have—which is, after all, part of creation.

MR. DREWEN: That includes virginity, doesn't it?

THE COURT: I'm not so sure that's good, Judge Drewen, but we won't pass on that.

You may be seated.

MR. DREWEN: Thank you.

THE COURT: This young lady, her first act after greeting a number of people—and is obviously quite well-known—is to pick up an apple from a stand.

Oh, before that, there was a little scene in which some young gentleman came up and took a red bolt of cloth and put it over her to see how it would look on her. In the

course of straightening it out, ran his hand over her left breast. And her retort to that was that "you're trying to get something for nothing."

She then went to the fruit stand and she was apprehended by a young police officer, only to find out to his chagrin that when she stole enough the suggestion was that the fruit stand operator took out in trade for the value of what she had stolen.

Thereafter she gets into an imbroglio with another coworker, and she succeeds in stabbing her in the face because the individual suggests that when she performs her tasks, she, Carmen, she leaves a souvenir with her customer, which I understand is one of the worst things you can say about one of those people.

MR. DREWEN: Your Honor is using figurative language, isn't he?

THE COURT: I am describing the motion picture.

MR. DREWEN: I see. In figurative language.

THE COURT: She is arrested by the same police officer who attempted to arrest her in the first instance for the apple.

Consider the symbolism of the apple, by the way.

MR. DREWEN: You shouldn't ask me to do that because I didn't know it had any symbolism.

THE COURT: Adam and Eve, I am thinking of.

He puts handcuffs on her, and while he's putting the handcuffs on her her hands are behind her back and they're near the genital area of the police officer and she succeeds in exciting him. So much so that he permits her to escape. And there is a chase and he blocks the police officers who

have come upon the scene, and she retreats to a house in which she lives, come upon a couple obviously engaged in sexual intercourse.

Thereafter we are treated to a series of events which disclose this young woman as a woman of complete worldliness.

MR. DREWEN: Complete what?

THE COURT: Worldliness. A woman who is incapable of loving any other human being. A woman who understands the functions of her body and understands the allurements that those functions have for males and the response that males will inevitably give to those functions. With this she corrupts the young police officer. She spends a night with him. And she says some significant words to the effect that "tonight we are man and wife." Which is about as near I suppose as she gets in the picture of exhibiting any emotion for another human being other than animal reaction.

After entertaining this young police officer she tosses him over. She interrupts his duties in attempting to arrest smugglers by promising him more. And when he comes to her, she gives him half of what she got for permitting the smugglers to come in, in money.

The police officer feels that he has perhaps fallen to the deep abyss and he goes to a chapel. But she shows up in the chapel, and she leads him out of there, the chapel.

The police officer then finds his senior officer has been corrupted by her, that the magistrate of the community has been corrupted by her, that the head of a parole board has been corrupted by her to the extent that he can be cor-

rupted since he is a panderer for his wife who is a lesbian. The magistrate who has been corrupted is one who leads a bacchanalian existence, in secret. She succeeds in having her husband released from jail because she has corrupted the head of the parole board and he is obviously a criminal. She uses other people in her own wife to obtain material ends, money, and finally after a series of events she meets the rock-and-roll or a folk singer, and at one point in an engagement with him she asks him, "Would you do anything for money?"

And he said, "Yes."

And she said, "Even kill?"

And he says, "Yes."

And thereby she forms probably what is the most enduring attachment that exists in the entire film, showing her complete faith in nature.

In the meantime, our young police officer has murdered his superior whom he caught in bed with Carmen, whom he loves. This is what we are to gather from the picture. He pursues her like a goat all over the place and becomes one of her criminal gang, and some of the crimes consist of being found in bed with respectable citizens, snapshots being taken, blackmail.

So finally he gets into an involvement with the husband of Carmen and kills him. And the remark is made, "You fool, why did you kill him? He would have sold her to you for ten dollars." Showing again this relationship which existed.

And she finally takes off and leaves everyone and goes with the rock-and-roll singer, and our friend who is wanted by the police officers, the police officer—a bad police

officer—comes back to the town where he had committed murder, killing his superior, and there is a scene in a cafe where the rock-and-roll singer is performing and Carmen is in the audience, and there is an attempt by this young man to gain her back, and at this point the libretto is almost identical to Bizet. She flees the tavern or nightclub, goes into the square, and we only see her from a distance; almost in silhouette; and there is this exchange; and if you heard Carmen, the "no," you can see her head move for the "no." There is no singing. There is just background music.

And our young man takes a knife and plunges it into her abdomen. And she drops in the middle of the square. And then his voice comes on the screen and it says, "Before they pick me up, I hid her body, so no one can find her."

MR. DREWEN: I can't hear that last.

THE COURT: "I hid her body, so no one could find her."

So we know at the end that his love was not love but lust.

Now, interspersed in this picture are many scenes in which sexual intercourse obviously occur, although it must be inferred, and a strong inference can be drawn. In one instance, cunnilingus. In another instance, fellation. In another instance, a lesbian encounter. But this must be inferred.

The language of the script, except for the use of the word "whore," couldn't be questioned.

At the end of the picture you are satisfied that the children of darkness indeed may enjoy the pleasures while they are here, and the big question is left as to what hap-

pens thereafter. In fact, there is a reference to St. Matthew someplace in the early part of the picture.

Now, if you want to view this picture as a series of bedroom scenes without what I have just described, then you're prurient. If you wanted to see this picture in light of the story line which I have just described, over-simplified, then perhaps you are looking for what the artist—and of course, as I understand it, the artist is the fellow who puts the film together—wanted to achieve. Incidentally, I don't think he did a good job. He could have done an excellent job. The photography is very good. Carmen is a —whoever she is—a good actress. The fellow who played the police officer I suppose comes through the way you want him to come through, but I think he overacted.

But does all this add up to something, when considered, that it is aimed at the prurient interest of the average member of our society considering contemporary community standards and that it is utterly without redeeming social value?

I suppose that if Carmen had been permitted to slay the police officer and go on her way, there would have been a perversion of moral values and we would have had a theological problem. But she wasn't. The artist had her pay her due, at the hands of the one person she couldn't shake; the one who tried to tie a relationship to her, albeit an inferior one, not a spiritual relationship; one based purely on matter, purely on sex. Although he didn't realize it until he unconsciously spoke as the picture indicated at the end.

Now, that's the movie I saw last night. When I look at it that way, I have to start quibbling with the artist. And that's why I mentioned the problem of art and prudence.

Sure, the artist owes an obligation to society when he creates a work of art to be prudent. Prudent not to scandalize. I'm talking in the field of aesthetics now. And aesthetics is nothing more than an attempted answer to the old maxim: de gustibus non disputandum est.

But in being prudent he must not prostitute his art, because in presenting life or existence he must present it as it is. With all its glories and with all its tawdriness. With all its beauty and with all its ugliness. With all its spirituality and with all its base material.

So his problem is a grave one, and while the critic may quibble with him, I have grave reservations as to whether the law can.

MR. DREWEN: Whether the what?

THE COURT: "Law can."

We have imposed upon us by the Supreme Court of the United States a standard to judge obscenity. I don't have too much difficulty with it.

Our language, our English language is an unfortunate language in that we do not have precise words such as the ancient Greeks had, for example. And in communicating, using the words of our language, sometimes we use words which mean different things to different people. But by now the standard established in Roth-Alberts by Justice Brennan, and reiterated in Memoirs versus Massachusetts, should at least among lawyers have taken significant if not pretty rigid meaning.

We find I think the real meaning of this definition only by looking at the material or subject matter of the cases which the Supreme Court has decided and to which it has applied this standard.

When I look at this film and I look at this test, whether the elements coalesce or not, it seems to me, one, that the dominant theme of this movie taken as a whole is not to a person of average intelligence merely one to appeal to the prurient interest of the members of society. It can. But there are individuals who can get awfully excited at a pencil. There are people who collect shoes, because they get sexual satisfaction from it.

What we are talking about is the "normal" member of society.

Secondly, is the material patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters? I am sure that no one would go to that picture or no one will learn anything new. There is nothing in that picture that actually portrays the sexual act. You must infer it. The only genitals that are seen are those of a male, and they're on a statue, and you can see those in the Vatican, Judge Drewen.

And the third test is whether it's utterly without redeeming social value. My reaction to the picture was the utter horror that an individual, a human being, a creature, could have sunk to such baseness without the suggestion that there was something wrong mentally; and, of course, this was a work of art. It wasn't life. And while it tried to portray life, the way this artist saw life, was through this woman, in this kind of a situation

The picture is not obscene, within the legal sense. If there are people who would be disturbed by something like this, they shouldn't go. If they think they would be disturbed by it, they shouldn't go. But that's not a reason to close it. There are people who may want to see it and may want to see it because they believe it is part of the contemporary expression shown in the art of motion pictures.

This individual who put this film together, one criticism, I think he did draw out some of the engagements, for want of a better term. I think it prostituted his art. I think it would have been a better picture if there had been more suggestiveness rather than more off-the-wall photography, as it were. Although I think, quite frankly, to have done it the way I think it should have been done perhaps would have made it more objectionable to some people, because it would have left the appetite hungry rather than to have oversated it. But, again, that's a problem for the artist, one of mechanics, and not one for the court.

This is a First Amendment problem, and I know of no judge in our system who thinks of any principle of law beyond this one with more reverence. We are what we are because of the First Amendment of the United States, and I'm referring to this country. Sure, there may be lots of things that people can criticize us for, but just remember, we can stand up and criticize ourselves and criticize everyone else for the same thing and attempt to do something about it, because we have the right of expression. And the day that we start to curtail it, I'm moving. And I'm sure you'll be along with me, Judge Drewen.

Mr. Monigan, you may prepare a final judgment.

MR. MONIGAN: Thank you, your Honor.

THE COURT: Incorporating the determination which I have made and enjoining the City from interfering with the exhibition of this picture.

MR. MONIGAN: Thank you, your Honor.

MR. DREWEN: Before you Honor rises, might I have a word with my associate?

THE COURT: Sure.

MR. MONIGAN: May I have P-1 back, your Honor?

THE COURT: Sure.

SUPERIOR COURT OF NEW JERSEY
CHANCERY DIVISION, HUDSON COUNTY
DOCKET NO.

VAN CURLER BROADCASTING CORP.,
Plaintiff,

v.

WILLIAM MUSTO, et al,
Defendants.

I certify the foregoing to be a true and accurate transcript of the proceedings in the above-entitled cause.

/s/ SAMUEL VANDER VALK
Official Court Reporter

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.*	No. 3123 MOTION TO SUPPRESS EVIDENCE AND DISMISS CHARGE

Comes now the defendant, William Rabe, by and through his attorneys, Critchlow, Williams, Ryals & Schuster, and moves the court for an order suppressing as evidence the film "Carmen Baby" on the grounds that said evidence was illegally seized and further moves that the charge against the defendant be dismissed.

Dated this 8 day of November, 1968.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Of Attorneys for Defendant

By: /s/ REMBERT RYALS

IN THE SUPERIOR COURT OF THE
STATE OF WASHINGTON
COUNTY OF BENTON

STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.*	No. 3123 ORAL OPINION DENYING MOTION TO SUPPRESS November 21, 1968

[Tr. 2-5]

THE COURT: State vs. Rabe.

MR. RYALS: This matter comes on upon the defendant's motion to suppress the evidence which was seized in this case, namely the film, Carmen Baby.

(Mr. Ryals argued to the court in behalf of the defendant. Mr. Ludwig argued in behalf of the State, after which Mr. Ryals argued in rebuttal.)

THE COURT: In regard to a motion for change of venue, I did have occasion to read this whole file, but I did not have the opportunity to read the cases cited in the brief, so I am ill-prepared at this moment to analyze the Metzger decision or others and, of course, that would be appropriate to a knowledgeable decision.

I am following the practice, to keep things moving, however, of—this has a trial date?

MR. LUDWIG: December 30.

THE COURT: Well, if I take it under advisement and on December 15th I announce that it is my conclusion that this matter should proceed on for trial, that the motion

should be denied, then counsel has been lulled into a situation of not preparing for a trial on the 30th, and I am inclined not to do that.

So I prefer, in a rather high handed and curbstone fashion, to deny the motion and advise both counsel that in the interim, I will review the briefs and if my decision is reversed by consideration of the cases, I will advise counsel to renote the motion for further consideration.

But in the meantime, I will deny your motion simply to keep the matter moving.

• • •

Now, the other thing that occurred to me during your argument, your argument sounds valid to me in regard to having knowledge of the overall nature of the film being displayed rather than specific scenes but, you see, where the question of whether this is an indoor or outdoor movie would come up, in my judgment, is that the position taken by Judge Yencopal as a trier of the fact was that short excerpts of this film would be viewed by families passing, I assume, on the highway, in regard to the matters displayed, so in this case, uniquely enough, I suppose that Judge Yencopal would have been permitted to consider isolated pieces of the film whereas that would not be true if the film was displayed in an indoor theater.

• • •

I am going to deny your motion and I will review your briefs and read the cases cited and if I feel inclined to reverse my ruling, I will advise counsel.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, *Plaintiff*, v. WILLIAM RABE, *Defendant*.	No. 3123 EXCERPTS FROM TRIAL TRANSCRIPT April 2, 1969 and April 24, 1969

No. 3123

EXCERPTS FROM TRIAL TRANSCRIPT

November 21, 1968 *et seq.*

[Tr. 9-10]

MR. RYALS: If a court can issue a warrant based on testimony by a police officer describing two scenes, presumably of three or four or five minutes length, out of a film which runs an hour and a half, I submit to you, Judge that there is probably no movie, certainly no movie that is getting what we call now an "M" rating, that would be safe, because movies such as The Fox described and showed scenes between two women making love, and showed a scene between a man and a woman making love without any clothes. These scenes in context were not offensive, and I don't think the movie has even been tested. I don't think anybody seriously has questioned it. So how can the hearing held before the judge in this case have focused searchingly on the question of obscenity?

These are not just words, because the Court has said that these publications are entitled to the highest protection before they are seized. This movie has now been

seized for six months or more. It has been out of circulation. So I would like to renew that motion at this time.

• • •

[Tr. 13]

"MR. RYALS: . . . Again, when you view the film I think you should keep in mind, in accordance with Jacobellis, it is the adult population, and if the legislature wants to decide differently the legislature may do so.

"We will present testimony from a broad cross-section of the community indicating their opinion as experts. We will have a person from Columbia Basin College, we will have others who are citizens, we will have people who are familiar with the opera Carmen.

"Has the court been furnished with the memorandum decisions of the other two trial courts that have examined this?

"THE COURT: Yes. I have read them.

"MR. RYALS: We will have testimony indicating that certainly no matter how you stretch it this film is not obscene, applying the present standards promulgated by the Supreme Court, which this court, of course, is bound to apply."

• • •

[Tr. 23]

[Objecting to an offer of the film into evidence]:

MR. RYALS: For the record, we would object in view of the fact that the warrant and seizure were not proper under the constitutional safeguards provided the defendant.

• • •

[Tr. 73]

"MR. RYALS: Your Honor, at this time, although I

think the motion should be granted, I recognize the Court would either do so summarily or deny it summarily, and for the record I would make the motion that the State's case be dismissed.

The State has presented, in our judgment, no evidence to sustain the three-cornered burden set forth by the Supreme Court. I particularly call attention to the opinions by the previous trial courts that have heard this case, and I ask the court in examining this testimony to be mindful of the opinions set down by our Supreme Court.

I don't mean to be overly personal but I do say this, that the judges who have applied these standards have been courageous and the standards have been established whether we agree with them or not, and they are the law of the land, and I would make that motion.

I would have a lot more to say at the conclusion of the case, but I think that protects the record.

THE COURT: It will be denied. You may proceed."

• • •

[Tr. 145]

THE COURT: . . . The point I am making is that I don't believe that it is necessary for this court to reach the issue of whether the picture taken as a whole is obscene. I think this court under these peculiar circumstances must consider each portion of the picture as viewed by, I suppose, all of the families in the residential area, all of the people driving over the overpass, as short scenes, individual portions of the movie, and in looking at it on that basis I agree with Justice Bowman.

Who can say that this is not obscene? In that light there

is no plot, nothing. Just an offensive demonstration displayed to families passing in the night.

• • •

[Tr. 146-47]

MR. RYALS: I would just like to say as far as I know every statement you have made is outside the record regarding the position of the theater, and as far as I also know this decision is an absolute first across the country that because of the drive-in you might get a fleeting glimpse.

The kids, now, are there by choice. They are there and they remain there. You tell me any drive-in movie where you are driving down the highway at 60 miles an hour and you can do any more than glance.

You say the screen faces the City of Richland and almost implies that the entire populace is looking out of their window, but the statements are not supported by the record, which is all the court will have on appeal. That is number one. Number two, I can visualize a situation where this court might want a ruling on the ultimate issue of obscenity to avoid a remand, and I would request that the court make such a ruling to avoid that problem, because I don't suspect the court is going to view a movie shown at a drive-in in that light, because a lot of movies, such as The Graduate, where you might see Ann Bancroft bare from the waist up, if you remember that scene from the movie, and if this is going to be the test applied by this court I think it is going to be overturned and I would like to see a ruling on the ultimate question.

• • •

[Tr. 148-49]

MR. RYALS: Let me just make one final point. Do you

know what you are saying, Judge? You are saying that no film can be shown in a drive-in movie if a single scene, no matter what context it is shown in, is offensive, and you are saying that such a film does not have to be adjudged obscene. That is a startling ruling. If that is the ruling, fine, but that is what you are saying?

THE COURT: You missed the point.

MR. RYALS: I must have.

THE COURT: If the drive-in movie faces a residential area and if the screen is not blocked off from the view of those people, then I suggest that each scene is a separate movie and you must consider that particular scene as to whether the movie is obscene.

• • •

[Tr. 164-65]

MR. RYALS: . . . I would also say that you have announced a decision that is a first in the country and it seems to me not fair to penalize Mr. Rabe for not having anticipated that decision. He announced to this court that normally they get caveats from the distributors and he follows those in his advertising. The prosecutor has put on no testimony there was any pandering involved in the advertising.

• • •

[Tr. 165]

THE COURT: It is just a figure that the court has to arrive at to perhaps persuade others that it isn't a financially successful venture to sell this type of film.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON IN AND FOR THE COUNTY OF BENTON

STATE OF WASHINGTON, *Respondent,* v. WILLIAM RABE, *Appellant.*	No. 3123 NOTICE OF APPEAL

TO: THE STATE OF WASHINGTON, Plaintiff, and
TO: CURTIS LUDWIG, Its Attorney

YOU AND EACH OF YOU will please take notice that William Rabe, the defendant above named, hereby appeals to the Supreme Court of the State of Washington from each and every part of the Judgment entered in the above-entitled Court on the 19th day of September, 1969, whereby the defendant was found guilty of a violation of RCW 9.68.010, to-wit, the crime of obscenity and was punished by being fined the sum of Six Hundred ($600.00) Dollars, and being required to pay the costs of this prosecution as the same may be taxed. The defendant is not now in custody.

DATED: This 3 day of October, 1969.

CRITCHLOW, WILLIAMS, RYALS & SCHUSTER
Of Attorneys for Defendant

By: /s/ REMBERT RYALS
REMBERT RYALS

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, *Plaintiff,* v. WILLIAM RABE, *Defendant.*	No. 41365 EXCERPTS FROM APPELLANT'S OPENING BRIEF

• • •

ASSIGNMENTS OF ERROR

1. The Court erred in denying the defendant's motion to suppress as evidence the film Carmen Baby.

2. The Court erred in entering Findings of Fact II, III, and IV, and Conclusions of Law II and III reading as follows:

Findings of Fact

II

That said Park-Y Drive-In Theatre faces a residential area of the City of Richland and an overpass providing a clear view of the screen to residents of the area and passing motorists.

III

That individual portions or scenes of the movie have a dominant theme which appeals to a prurient interest in sex, is patently offensive because it confronts contemporary community standards relating to the representation of sexual matters and is utterly without redeeming social value.

IV

That passing motorists and residents outside the theatre are in a position to see only individual portions or scenes of the movie.

Conclusions of Law

II

Individual portions or scenes of the movie "Carmen Baby" are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves.

III

That the defendant, William Rabe, is guilty of exhibiting an obscene movie and judgment and sentence should be entered accordingly.

3. The Court erred in entering Judgment finding the defendant guilty of the crime of obscenity and punishing him accordingly. (Br. 8-9)

• • •

It is undisputed that in the instant case no adversary proceeding was held before the film, "Carmen Baby," was seized. Further, the hearing held prior to seizure did not "focus searchingly on the question of obscenity." The officer described two scenes from the film. He gave no testimony concerning its length or dominant theme. Thus, there was no way for the Judge to know whether there was probable cause to believe the film was obscene. This will be more apparent after an examination of those cases which consider the question of obscenity, some of which are discussed below. (Br. 12)

• • •

In the case at bar there is no evidence or any suggestion that the defendant was guilty of pandering in the manner in which he advertised the film for showing. Rather the record is totally devoid of any testimony that the advertising was salacious.

The trial Judge refused to determine whether the film

taken as a whole was legally obscene. Rather, he elected to declare that because the film was shown in an outdoor theatre each of its scenes must be examined independently. As far as the defendant has been able to ascertain this decision represents a total departure from the rationale of the cases heretofore decided. It should be noted that the Legislature has not passed any law placing drive-in movies in a separate category nor has any law been enacted directed specifically to minors. Therefore, the case of *Jacobellis v. Ohio*, 378 US 184 is worthy of consideration. (Br. 13-14)

• • •

In view of the above decisions the trial court erred in deciding that a movie shown at a drive-in theatre must be dissected and examined after this dissection is complete in order to determine whether it is legally obscene. This same rationale could well be applied to books which are exhibited for both adults and minors to purchase and parts of which may be read by the general public without a reading of the total publication. Film producers and authors would be impossibly handicapped if segments of their works were considered completely out of context by the reviewing courts. It should again be emphasized that the Washington State Legislature has not seen fit to distinguish between age groups of our population or between the manner in which a film is exhibited. It is common knowledge that the screens of many if not most drive-in theatres are viewable from outside the confines of the theatre. Thus, if the trial court is correct most drive-in theatres would be subjected to tests totally dissimilar to those applied to other theatres. This "isolated parts" test has been heretofore completely rejected. *Roth v. United States*, 354 US 476: . . . (Br. 15)

• • •

. The defendant' witnesses were unanimous in their opinion that the film was not legally obscene. Some of these based their opinion on the fact that its dominant theme did not appeal primarily to a prurient interest and others felt that it was not patently offensive or that it did not offend contemporary community standards. To ignore the testimony of these witnesses would be to examine the film in a vacuum. (Br. 17)

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Clearly the film Carmen Baby is not within the scope of the term obscenity as this term has been defined and explained by the courts. (Br. 18)

IN THE

Supreme Court of the United States

October Term, 1971

No. 71

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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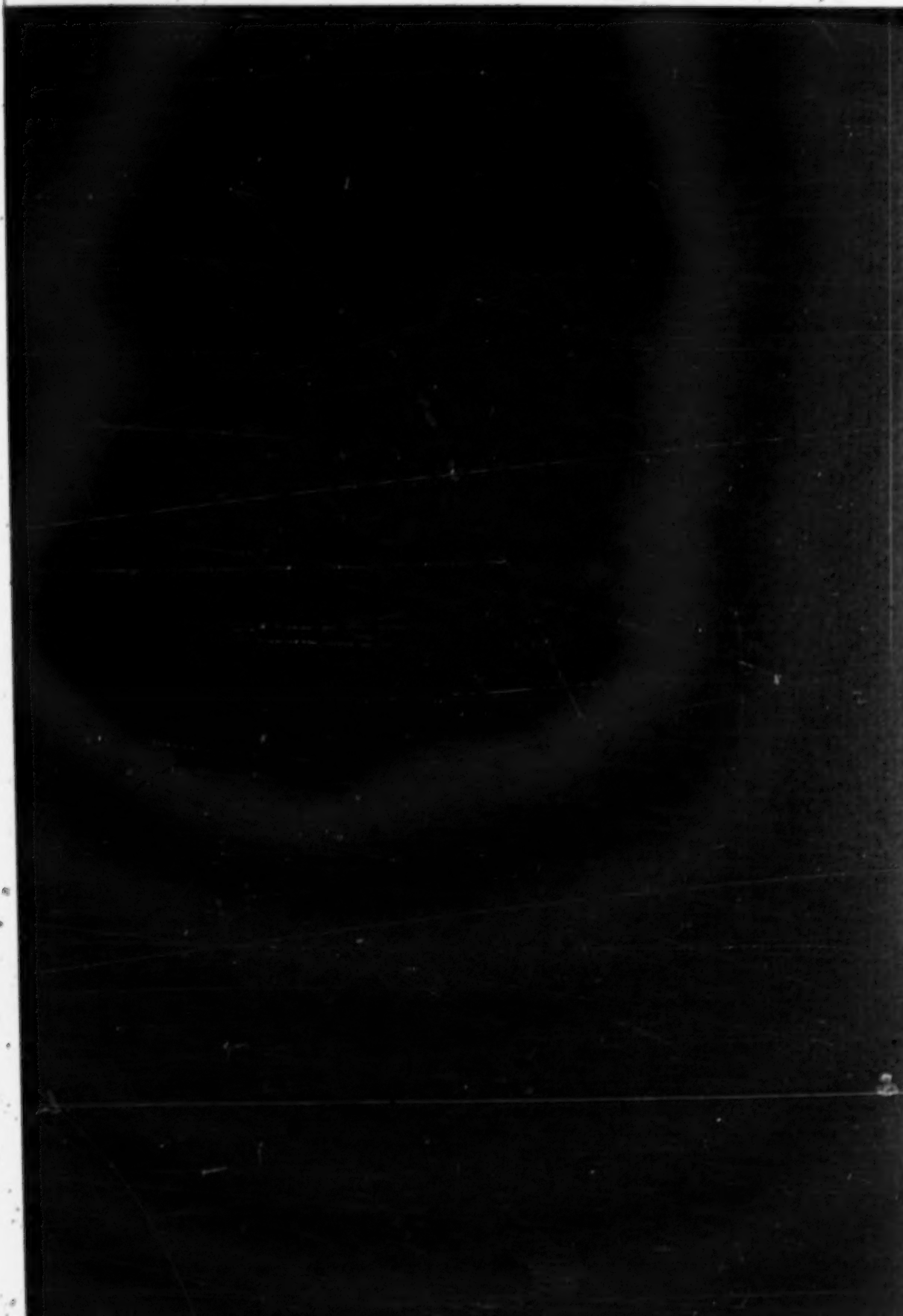

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IN THE

Supreme Court of the United States

October Term, 1971

No.....

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Petitioner, William Rabe, prays that a writ of certiorari issue to reveiw the judgment of the Supreme Court of the State of Washington entered in this cause on May 6, 1971, and that on hearing the judgment of conviction be reversed.

OPINIONS BELOW

The following opinions and decisions of the courts of the State of Washington are set forth in the Appendix hereto:

1. Opinion of the Supreme Court of the State of Washington, reported at Volume 79, Washington Reports 2nd, page 254, 484 P.2d 917, May 6, 1971 (App. 19-44).

2. Order Denying Motion to Suppress, Justice Court, Richland Precinct, September 27, 1968 (App. 1-4).

3. Decision, Justice Court, Richland Precinct, October 7, 1968 (App. 5-14).

4. Findings of Fact, Conclusions of Law, and Judgment, Superior Court of the State of Washington for Benton County, September 22, 1969 (App. 15-17, 18).

JURISDICTION

The judgment of the Supreme Court of the State of Washington following appeal from petitioner's conviction was entered on May 6, 1971. On July 28, 1971, this Court entered an order extending the time within which to petition for certiorari to and including August 18, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner, the manager of a drive-in theatre, of criminal violation of a general obscenity statute for exhibiting "Carmen Baby," a motion picture which is not obscene under the standards established by this Court, on the rationale that the picture contains erotic scenes which might be viewed unwittingly and out of context by persons having a view of the screen from nearby houses or passing automobiles.

2. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner of a crime for showing a non-obscene motion picture containing allegedly offensive scenes on a drive-in screen visible from nearby houses and roads, on the rationale of protecting privacy, where the statute relied upon prohibited only the dissemination of obscene materials, the

state had not enacted a statute of the "offensive display" type or any other law giving petitioner notice of the conduct sought to be punished, no one had complained about the film, and there was no evidence that anyone in nearby houses or passing cars had in fact seen it on the screen.

3. Whether the First and Fourteenth Amendments permit the seizure of a motion picture, incident to an exhibitor's arrest on an obscenity charge, where the arrest warrant was issued solely on the testimony of a police officer who had seen most but not all of the film from a distance without hearing any of the sound track, the testimony described individual scenes in the picture, nothing was received in evidence on the film's dialogue or plot, and the magistrate held no adversary hearing on the question of alleged obscenity.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, §1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of the State of Washington, 1961, Ch. 146, § 1, codified as § 9.68.010, page 153, Title A, Revised Code of Washington Annotated:

> 9.68.010 *Obscene literature, shows, etc.* Every person who—
>
> (1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or
>
> (2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> Shall be guilty of a gross misdemeanor.

STATEMENT OF THE CASE

1. The Motion Picture Involved

This case arises from petitioner's criminal conviction following the showing of a motion picture entitled "Carmen Baby" at a drive-in theatre of which he was manager.

The film is a dramatic story based upon the libretto of the opera "Carmen," which in turn was based upon a novel by Merimee (Tr. 111, 132). It tells of an upright police officer who is corrupted and ultimately destroyed by his physical passion for a prostitute (Tr. 89, 93, 104, 119). The film contains erotic scenes, but sexual consummation is suggested rather than shown (Tr. 88, 122), and the scenes are an integral part of the story and the theme of moral decline and fall (Tr. 89, 108, 115, 120).

Prior to the events here in question, "Carmen Baby" was reviewed in the *New York Times* and was exhibited in various parts of the United States (Tr. 133-34, 76, 84). One witness had seen it playing at Oak Ridge, Tennessee, on an outdoor screen visible from a motel which had arranged to have the sound track of the motion picture piped into the rooms for those who wished to watch it (Tr. 84). In two states, Rhode Island and New Jersey, "Carmen Baby" had been tested in the courts and found to be non-obscene and protected under the free speech guaranty of the First and Fourteenth Amendments. Transcripts of these two unreported state trial court decisions[1] were filed by petitioner in the superior court below, and are reproduced in the Appendix hereto (App. 53, 57). In one of them, Judge Matthews of the New Jersey court gave a concise and engaging summary of the film's contents (App. 71-79), concluding:

> "We have imposed upon us by the Supreme Court of the United States a standard to judge obscenity. I don't have too much difficulty with it. . . .
>
> • • •
>
> "When I look at this film and I look at this test, whether the elements coalesce or not, it seems to me, one, that the dominant theme of this movie taken as a whole is not to a person of average intelligence merely one to appeal to the prurient interest of the members of society. It can. But there are individuals who can get awfully excited at a pencil. There are people who collect shoes, because they get sexual satisfaction from it.
>
> "What we are talking about is the 'normal' member of society.

---

1. *Scuncio v. Columbus Theatre, Inc.*, C.A. 67-4565, R.I. Superior Ct.; *Van Curler Broadcasting Corp. v. Musto*, Superior Court of N.J., Hudson County.

"Secondly, is the material patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters? I am sure that no one would go to that picture or no one will learn anything new. There is nothing in that picture that actually portrays the sexual act. You must infer it. The only genitals that are seen are those of a male, and they're on a statue, and you can see those in the Vatican," Judge Drewen.

"And the third test is whether it's utterly without redeeming social value. My reaction to the picture was the utter horror that an individual, a human being, a creature, could have sunk to such baseness without the suggestion that there was something wrong mentally; *and, of course, this was a work of art. It wasn't life. And while it tried to portray life, the way this artist saw life, was through this woman, in this kind of a situation.*

"The picture is not obscene, within the legal sense. . . ." (App. 77-78; emphasis added)

In the State of Washington, the motion picture was exhibited in Seattle, and in a three-week engagement at a drive-in theatre in Yakima (Tr. 76). It was then booked into the Park Y Drive-in Theatre at Richland, another town in Eastern Washington (Tr. 76). Petitioner was the manager of the latter theatre (Tr. 74).

2. Justice Court Proceedings

"Carmen Baby" opened at the theatre in Richland on August 25, 1968. On August 30, 1968, a sergeant of the Richland Police Department signed a criminal complaint and appeared before a justice of the peace seeking a "John Doe warrant" to arrest either the manager or projectionist of the theatre on a charge of showing an obscene film (App. 47). The police sergeant testified that he had seen most of the film on the nights of August 28 and 29, and

described two scenes, one which he characterized as "lewd" and another which he described in answer to the magistrate's inquiry as to whether there were "other scenes of unnatural emotions" (App. 48). He gave no testimony as to the film's thematic content. Indeed, he could not do so, since he had never heard the sound track but only watched the picture from a distance (Tr. 17, 18-19).

The magistrate conducted no adversary hearing and received no other evidence. On the basis of the police sergeant's testimony, he issued a warrant for the arrest of "John Doe" (App. 50). The police then went to the theatre, seized the film, and arrested petitioner (Tr. 15-16).

A trial was held in justice court on the charge that petitioner had violated RCW 9.68.010, the Washington obscenity statute. Before trial, petitioner moved to suppress the film as evidence on the ground that it had been seized in violation of the First and Fourteenth Amendments (App. 51). The justice of the peace denied this motion, rendering a written decision (App. 1). Following trial, the justice of the peace found petitioner guilty on October 7, 1968, and sentenced him to pay a fine (App. 5).

3. Superior Court Proceedings

Petitioner appealed his justice court conviction to the Superior Court for Benton County, the state court of general trial jurisdiction (App. 52). In that court he renewed his motion to suppress, which was again denied (App. 81, 82).

In superior court the case was tried *de novo* commencing April 2, 1969, to the judge sitting without a jury. The

prosecution called six witnesses who rendered opinions on the quality of the film, as follows:

(a) A speech and drama instructor at Columbia Basin College testified that in his opinion the dominant theme of the picture was an appeal to prurient interest, and that it had no redeeming social value, but conceded that he could not say whether it offended contemporary community standards in its portrayal of sex (Tr. 30, 35, 36).

(b) The local vice president of Atlantic-Richfield Company—who, like the other non-experts called by the state answered opinion questions couched in conclusory language by the prosecutor—testified that in his opinion the predominant theme of the film was an appeal to prurient interest, that it was patently offensive in affronting contemporary community standards, and that it had no redeeming social value (Tr. 39-41). Cross-examination revealed that in the preceding two years he had seen only three motion pictures—a Billy Graham film, "The Sound of Music," and "Doctor Zhivago"—and that he had avoided "The Graduate" because in his opinion "it is not good for me, and I guess, therefore, others, to see things like this" (Tr. 42-43).

(c) An insurance agent gave the same conclusory answers to the prosecutor on the three-part obscenity test (Tr. 44-45). But on cross-examination he was unable to give any definition for the word "prurient" (Tr. 46).

(d) The manager of a foods processing plant, a member of the school board, gave the same set of conclusory answers on the obscenity elements (Tr. 49-50). Cross-examination brought out that he was simply equating his personal moral feelings with community standards, and

had testified in terms of the former (Tr. 50-51, 53).

(e) A farmer gave the same set of conclusory answers, but admitted that he was not familiar with current motion pictures, having only seen two in the past five years, and was testifying on the basis of his "personal feeling" (Tr. 56-58).

(f) A psychologist expressed similar conclusions in applying the three-part test for obscenity, although his answer as to community standards was largely unresponsive (Tr. 62-63). He added an opinion that "nudity was underplayed" in the film, which might result in an appeal to "latent homosexuality" (Tr. 63-4). This witness thought that *all* motion pictures are a damaging influence and had seen none in the last five years except some westerns and a James Bond movie (Tr. 66, 69).

Six witnesses testified on petitioner's behalf that the predominant theme of the film was a dramatic story with a moral message (variously interpreted), that it did not offend contemporary community standards, and that it possessed redeeming social value:

(a) A radiological engineer, formerly a professional photographer, chairman of the local Children's Home Society, described other films of equal candor being shown routinely in the vicinity, and praised the photography and theme of "Carmen Baby" (Tr. 84-97).

(b) A woman administrative assistant at the Atomic Energy Commission, chairman of the Library Board for the City of Richland, testified that the picture's theme was "[t]he degradation or almost annihilation of a personality as a result of his obsession for a woman," and that the erotic scenes were necessary to the story (Tr. 103-8).

(c) A mother of four children with a degree in English literature found the "characters interesting" and the opening scene "a beautiful thing" (Tr. 110-115).

(d) A Ph.D in physics saw the film as "a classic tragedy on the Greek model" (Tr. 117-122).

(e) A systems analyst, who sees 75 to 100 motion pictures per year, described this one as "artistic in nature" and as telling "a story that has some value . . ." (Tr. 124-129).

(f) The chairman of the language arts department at Columbia Basin College listed parallels between the film and the opera "Carmen" (Tr. 131-138).

The police sergeant who had signed the criminal complaint testified that the drive-in theatre screen was visible from a nearby highway, and that on both nights that he sat outside the theatre in his car he had seen teenagers and younger children watching the film through a wire fence which surrounded most of the premises (Tr. 17, 20-21).

Petitioner testified that as theatre manager he had been occupied running the concession stand and the ticket office every night, and had never seen the film at the time of his arrest, although he had heard comments about it (Tr. 74-82). This testimony was uncontradicted.

At the close of the evidence and following argument the superior court judge rendered an oral opinion stating, in effect, that he would find petitioner guilty without finding the film to be obscene in the constitutional sense. He stated:

> "The point I am making is that I don't believe that it is necessary for this court to reach the issue of whether the pitcure taken as a whole is obscene. I

think this court under these peculiar circumstnaces must consider each portion of the picture as viewed by, I suppose, all of the families in the residential area, all of the people driving over the overpass, as short scenes, individual portions of the movie, and in looking at it on that basis I agree with Justice Bowman.

"Who can say that this is not obscene? In that light there is no plot, nothing. Just an offensive demonstration displayed to families passing in the night." (App. 86-87)

On April 24, 1969, the judge allowed the prosecution, over petitioner's objection, to reopen to present the testimony of an additional police officer (Tr. 151-53, 155). The officer testified that approximately twelve to fifteen residences in the area have a view of the screen at the drive-in theatre (Tr. 163).

Six months later, on September 22, 1969, the superior court entered its written findings and conclusions, including most significantly Conclusion of Law II:

"Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves." (App. 16)

The court made no findings as to whether petitioner had known the contents of the film, or whether the film as a whole was obscene within the meaning of that term as defined by this Court (App. 15-17). A judgment of "guilty of the crime of obscenity" was entered, and petitioner was sentenced to pay a fine of six hundred dollars (App. 18).

4. State Supreme Court Proceedings

Petitioner appealed his conviction to the Supreme Court of the State of Washington, which received briefs and

heard argument *en banc*. On May 6, 1971, the court filed its opinion affirming the conviction (App. 19-44). Rejecting petitioner's arguments both on the seizure point and on the merits, the court held that the film "probably would pass the definitional obscenity test" of *Roth v. United States*, 354 U.S. 476 (1957), but that the "context of its exhibition" made it obscene in this instance (App. 30-31). While apparently conceding that neither the presence of juveniles outside the fence nor the possible glimpses by passing motorists could support a conviction, the majority concluded that the exhibition of "lewd and offensive films" visible from houses would violate the residents' "individual privacy" contrary to RCW 9.68.010, the obscenity statute (App. 35-37).

Pending the submission of this petition for certiorari, petitioner filed a motion in the state court for a stay of execution of judgment until a ruling from this Court could be obtained. That motion was denied by the Supreme Court of the State of Washington on July 6, 1971. Petitioner thereupon applied to this Court for a stay of execution, which application is still pending at the time this petition is written. The sentence imposed upon petitioner has not yet been executed.

QUESTIONS RAISED BELOW

Part II of the Appendix hereto sets forth excerpts from proceedings in the courts below relating to the time and manner in which the questions here presented were raised, and the state courts' rulings thereon. The following is a summary of those and other relevant parts of the record:

1. Questions One and Two

(a) On September 3, 1968, petitioner entered a plea of

not guilty to the criminal complaint charging him with violating section 9.68.010, Revised Code of Washington (R. 20).

(b) On October 3, 1968, a trial on the merits was held in justice court. On October 7, 1968, the justice court judge entered his written decision finding the film "Carmen Baby" obscene and finding petitioner guilty (App. 4).

(c) On October 9, 1968, petitioner filed a notice of appeal to the Superior Court of the State of Washington for Benton County "from the judgment and sentence herein made and entered in said Justice Court on the 7th day of October, 1968" (App. 52).

(d) Before his trial *de novo* in superior court, petitioner filed with the court the transcripts of the judicial opinions from New Jersey and Rhode Island (App. 53, 57). These transcripts were filed in support of petitioner's contention that, since the film was constitutionally protected, he could not be convicted under the obscenity statute for exhibiting it.

(e) At the outset of petitioner's superior court trial, his counsel urged that under *Jacobellis v. Ohio*, 378 U.S. 184 (1964), the court was obligated under the general obscenity statute to apply a standard applicable to the entire adult population, and that the legislature had not passed a statute applicable to other types of conduct (App. 85).

(f) At the outset of the superior court trial, petitioner's counsel stated that the film could not be held obscene under the standards promulgated by this Court (App. 85).

(g) When the prosecution rested, petitioner moved for dismissal on the ground that there was "no evidence to

sustain the three-cornered burden set forth by the Supreme Court" (App. 86).

(h) After both sides had rested, the superior court judge indicated that he would dispose of petitioner's contentions by declining to reach the question of whether the picture taken as a whole was obscene, and would rule on the basis of short scenes visible to nearby residents and passing motorists (App. 86-7).

(i) In reply, petitioner's counsel argued that such a decision would be "an absolute first across the country"; that such a test would affect "a lot of movies, such as 'The Graduate' "; that the court should rule on the obscenity issue raised by the charge; and that the court was in effect "saying that such a film does not have to be adjudged obscene" (App. 87-88).

(j) Petitioner objected to the proposed reopening of the record to receive testimony on the visibility of the theatre screen from nearby houses (Tr. 152). The court allowed the prosecution to reopen and received the additional testimony (Tr. 155).

(k) Prior to the imposition of sentence, petitioner's counsel argued to the superior court that it had "announced a decision that is a first in the country and it seems to me not fair to penalize Mr. Rabe for not having anticipated that decision" (App. 88).

(l) On September 22, 1969, the superior court entered its findings, conclusions and judgment adjudicating petitioner to be guilty, and, in effect, rejecting his contentions made before and during trial (App. 15-17, 18).

(m) On October 6, 1969, petitioner filed a notice of ap-

peal to the Supreme Court of the State of Washington "from each and every part of the Judgment entered in the [Superior Court for Benton County] on the 19th day of September, 1969 . . ." (App. 89).

(n) In his brief to the Supreme Court of the State of Washington, petitioner assigned as error the superior court's entry of Findings of Fact II, III, and IV, and Conclusions of Law II and III, constituting all of the court's findings on the location and visibility of the screen, the content and quality of the film, the conclusions regarding "individual portions or scenes," and the adjudication of guilt (App. 90-91).

(o) In his brief to the State Supreme Court, petitioner further assigned error to the entry of judgment finding him guilty under the obscenity statute (App. 91).

(p) In his brief to the State Supreme Court, petitioner raised the following points:

(i) there was no evidence of pandering (App. 91);

(ii) the trial court erroneously refused to decide whether the film taken as a whole was obscene, and instead examined each scene independently, "a total departure from the rationale of the cases heretofore decided" (App. 91-92);

(iii) the legislature had not passed any law placing drive-in movies in a separate category, nor any law directed specifically to minors (App. 92);

(iv) the trial court's rationale could be applied to non-obscene books, and film producers and authors would be impossibly handicapped if segments of their work were considered out of context by the courts (App. 92);

(v) the Washington State Legislature had not distinguished between age groups of the population, or between the manners in which a film is exhibited (App. 92);

(vi) if the trial court were upheld most drive-in theatres would be subjected to tests totally dissimilar to those applied to other theatres (App. 92);

(vii) the "isolated parts" test used by the trial court was rejected in *Roth v. United States*, 354 U.S. 476 (App. 92);

(viii) the film "Carmen Baby" is not within the scope of the term "obscenity" as that term has been defined by the courts (App. 93).

(q) The Supreme Court of the State of Washington, by its opinion filed May 6, 1971, affirmed petitioner's conviction and sentence (App. 19-44).

2. Question Three

(a) On September 19, 1968, petitioner filed a motion and supporting brief to suppress the film "Carmen Baby" as evidence on the ground that the warrant under which the film was seized was issued without the procedural safeguards required by the First and Fourteenth Amendments (App. 51).

(b) The motion to suppress was denied by the justice court (App. 1-4).

(c) In superior court petitioner filed a second written motion to suppress on the same grounds (App. 81).

(d) The superior court denied petitioner's motion by oral decision of November 21, 1968 (App. 82-83).

(e) At the start of his superior court trial on April 2, 1969, petitioner renewed his motion to suppress, again urging that the *pre-seizure proceedings* had failed to include a hearing which focused searchingly on the question of obscenity (App. 84-85). The motion was again denied (Tr. 11).

(f) When the film was offered into evidence, petitioner objected on the grounds that the warrant and seizure were unconstitutional (App. 85), and the objection was overruled.

(g) In his brief to the Supreme Court of the State of Washington, petitioner assigned as error the denial of his motion to suppress as evidence the film "Carmen Baby" (App. 90).

(h) In his brief to the state Supreme Court, petitioner raised the following points:

(i) there was no adversary proceeding before the film was seized, nor any hearing which focused searchingly on the question of obscenity (App. 91);

(ii) the police sergeant gave no testimony concerning the film's length or dominant theme, and there was accordingly no basis for the magistrate to find probable cause (App. 91).

(i) The Supreme Court of the State of Washington rejected petitioner's position in its opinion filed May 6, 1971 (App. 19-44).

REASONS FOR GRANTING THE WRIT

This case raises questions of great importance on the interaction between freedom of speech and the right to privacy, and on due process of law in the context of First Amendment rights.

1. Question One

While the Washington Supreme Court has conceded only that "Carmen Baby" "probably" would pass the definitional obscenity test, the record makes unmistakably clear that it would. The film has a predominant dramatic theme,

possesses genuine social value, and is well within the prevailing community standards of candor. Thus it is constitutionally protected under the standards carefully developed in *Roth v. United States*, 354 U.S. 476 (1957), *A Book v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), and other cases.[2]

It is axiomatic that attempts to punish non-obscene materials under general obscenity statutes are unconstitutional under the freedom of speech guaranty of the First and Fourteenth Amendments. E.g., *Jacobellis v. Ohio* 378 U.S. 184 (1964). Here, Washington attempts to escape that principle on the rationale that the film was exhibited in a fashion which invaded privacy. In doing so it relies upon this Court's *per curiam* opinion in *Redrup v. New York*, 386 U.S. 767 (1967), where the Court observed in reversing three convictions:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. Alexandria, 341 U.S. 622; Public Utilities Comm'n v. Pollak, 343 U.S. 451. And in none was there evidence of the sort of 'pandering'

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2. It is manifest that "Carmen Baby" is superior to much other material within the broad scope of First Amendment protection. *See, e.g.*, the holdings in *Ratner v. California*, 388 U.S. 442 (1967) (per curiam) ("Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam) (various films); *Schackman v. California*, 388 U.S. 454 (1967) (per curiam) (various films); *I M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam) ("Artist's Models"); *Robert-Arthur Management Corp. v. Tennessee*, 389 U.S. 578 (1968) (per curiam) ("Mondo Freudo" and trailer for "Olga's Girls"); *Cain v. Kentucky*, 397 U.S. 319 (1970) (per curiam) ("I, a Woman"); *Bloss v. Michigan*, 29 L.Ed.2d 106 (May 3, 1971) ("A Woman's Urge").

which the Court found significant in Ginzburg v. United States, 383 U.S. 463." *Id.*, 386 U.S. at 769.

The Washington court has construed the foregoing language to mean that an *obscenity* statute—not a privacy-protection statute—can be wielded to punish the exhibition of non-obscene materials where supposed privacy interests are at stake. Such an application of the law would seriously inhibit expression and invest prosecuting authorities with unbridled discretion to punish speech.

A question of prime importance is thus raised as to the *means* a State may use to suppress speech for the sake of privacy: Did *Redrup* authorize the use of general obscenity statutes to punish supposed invasions of privacy by the display of *non-obscene* materials, absent a statute expressly drawn for that purpose?

The answer must be negative if First Amendment freedom in this context is to be preserved. Even if a State may regulate the content of public displays visible to an unwilling audience of passersby, surely it may do so only by the enactment of a specific statute narrowly drawn to deal with the matter sought to be proscribed. It has long been the rule that First Amendment rights may not be restricted by a statute, general and indefinite in its terms, which leaves a wide area of discretion to enforcement authorities. *Cantwell v. Connecticut*, 310 U.S. 296 (1940). In those cases where this Court has sanctioned limitations upon First Amendment rights on the basis of asserted invasions of privacy, it has done so only in the context of approving narrowly drawn statutes or ordinances designed to protect the asserted privacy interests. See *Breard v. City of Alexandria*, 341 U.S. 622 (1951), cited by the Court on the privacy point in *Redrup* (ordinance regulating the solicitation

of homeowners as to commercial materials); *Rowan v. United States*, 397 U.S. 728 (1970) (federal statute allowing recipient of certain types of material in the mail to have his name removed from mailing lists); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ordinance prohibiting the use of sound trucks which emit loud and raucous noises).[3] Washington, however, has passed no statute at all directed to the supposed harms described by its Supreme Court as justifying petitioner's conviction.

The standard set forth in *Roth* was carefully and precisely formulated; the Court recognized that only in this way can the obscenity standard have ascertainable meaning. *Roth v. United States*, 354 U.S. 476, 491 (1957). The Washington Court, however, has jettisoned this established meaning of obscenity and substituted one which is vague, overbroad and, indeed, incomprehensible.

The *Roth* standard requires that each motion picture be judged as a whole; a film cannot be suppressed merely because certain scenes are thought objectionable. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Trans-Lux Distributing Corp. v. Regents of the University of New York*, 380 U.S. 259 (1965) (per curiam). The newly announced Washington standard for outdoor screens would test each individual "scene" for thematic content, offensiveness and redeeming social value (App. 28).

3. *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952), also cited by the court in *Redrup*, was a civil action, not involving a statute, in which the court held that a regulatory commission's order authorizing piped-in music in District of Columbia street cars did not violate the passengers' First Amendment rights. *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert denied*, 400 U.S. 903 (1970), relied upon by the Washington Supreme Court, was also a civil action, involving a university's right to regulate the contents of art displays on the corridor walls of the institution.

But what is a "scene"? Would a single image flashed on the screen for a few seconds constitute a "scene" for purposes of invoking criminal liability? In numerous films on Biblical themes, or on the nature of contemporary life, or on many other subjects, one could single out a small part and declare it, wrenched from its context, to have a predominantly prurient appeal and to be devoid of redeeming social value. Should all such pictures be barred from the outdoor screens? If so, would that not eliminate from this important medium of communication all films having any erotic content whatever? If not, how could the exhibitor rationally decide which pictures to exclude? The concept of an individual "scene" being "obscene" even though the film is not would afford him no guidance, for it defies comprehension—and the predictable result would be that timidity and over-caution which so effectively chill expression.

The record shows that the screens of many if not most drive-in theatres are visible from points outside their enclosures (Tr. 149). Thus the decision below, unless reversed, will seriously abridge the First Amendment rights of many outdoor film exhibitors, and, necessarily, of innumerable members of their audiences.

The impossibility of applying the obscenity concept to isolated parts of a protected work is shown by the Washington court's conclusion, near the end of its opinion, that "lewd and offensive films" are barred where privacy is involved (App. 36).

This lapse into vagueness reveals that the court's trans-

formation of the obscenity statute would deprive the law of its ascertainable, constitutional meaning and engraft upon it a second standard of unconstitutional breadth and obscurity. The phrase "lewd and offensive," adopted as the end product of the court's reasoning, is the very type of vague, overbroad language which has been repeatedly stricken down where First Amendment rights are at stake.[4]

Thus, by adopting a vague, fragmented-parts obscenity test for films shown on drive-in screens, the State has violated the rule that a statute containing indefinite standards for the restriction of speech is invalid under the due process clause. The public must be fairly apprised of what is forbidden. In *Winters v. New York*, 333 U.S. 507 (1948), the Court said: "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." *Id.* at 515. And it is no answer that the meaning of a speech-restricting statute could be filled in by judicial construction; such content cannot constitutionally be supplied by a series of criminal

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4. E.g., *Holmby Prod., Inc. v. Vaughn*, 350 U.S. 870 (1955) (not "of a moral, educational or amusing character"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("cruel, obscene, indecent and immoral, or tend to debase or corrupt morals . . ."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacreligious"); *Trans-Lux Distributing Corp. v. Maryland State Bd. of Censors*, 240 Md. 98, 213 A.2d 235 (1965) and *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A.2d (1965) ("dominant purpose or effect is erotic or pornographic, or if it portrays acts of sexual immorality, lust or lewdness, or if it expressly or implicitly presents such acts as desirable, acceptable or proper patterns of behavior"); *Kingsley Corp. v. Regents*, 360 U.S. 684 (1959), ("acts of sexual immorality . . . as desirable, acceptable, or proper patterns of behavior"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) "sexual promiscuity . . . in such a manner as to be, in the judgment of the court, likely to incite or encourage delinquency or sexual promiscuity . . . etc.").

prosecutions. *Dombrowski v. Pfister*, 380 U.S. 479, 490-491 (1965).[5]

2. Question Two

Significant issues of First Amendment due process, apart from the issue of vagueness discussed above, are raised by Washington's judicial extension of its obscenity statute to punish the exhibition of a non-obscene film on grounds of invasion of privacy.

The State has not enacted a statute of the "offensive display" type, although other jurisdictions have done so.[6] Nor, as the court itself points out, had Washington even recognized a common law right of privacy until the day of the instant decision (App. 36).

The statute invoked against petitioner, RCW 9.68.010—passed in its present form in 1961, following the *Roth* de-

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5. Similar issues to those presented by Washington's use of its obscenity statute to punish conduct not specified therein are raised by the use of general nuisance laws to suppress speech. The Third Circuit has recently stricken down the attempted use of public nuisance law to enjoin exhibition of a film on the ground that such use of nuisance laws violated the constitutional rule that speech may not be punished under a statute which fails to define precisely the offense charged. The Court held that while the law of nuisance is appropriate in some contexts, it "may not be used . . . both to define the standards of protected speech and to serve as the vehicle of its restraint." *Grove Press v. City of Philadelphia*, 418 F.2d 82, 88 (Cir., 1969).

The nuisance issue is before the Court in the coming term in *Mitchum v. Foster*, No. 876, probable jurisdiction noted, 29 L.Ed.2d 109 (May 3, 1971).

6. *E.g.*, New York Senate Bill No. 5609, approved on June 25, 1971, prohibiting the public display of materials depicting nudity, and other defined materials, "in such manner that the display is easily visible from or in any public street. . ."; and Arizona House Bill 301, approved May 10, 1971, prohibiting the public display of certain defined "explicit sexual material" in locations "easily visible from a public thoroughfare, from the property of others, or from commercial or business premises generally open to minors at the time of such placing."

cision—necessarily carried to petitioner and others a specific meaning: that criminal sanctions could follow from the dissemination, with knowledge of its contents, of a motion picture which was obscene when taken as a whole within the meaning of *Roth* and subsequent decisions.

The statute said nothing about proscribing individual scenes, and nothing about anyone's right to privacy.

The State's judicial pronouncements, moreover, had supported the protection of motion pictures under the freedom of speech guaranty, excepting those which were obscene. *Fine Arts Guild, Inc. v. Seattle,* 445 P.2d 602 (Wash. 1968).

Thus nothing in the statute or elsewhere gave petitioner notice that he could be prosecuted for exhibiting a non-obscene film at a drive-in the screen of which was visible from afar. Closely in point is the Court's recent reversal of a speech-punishment conviction in *Cohen v. California,* 29 L.Ed.2d 284 (1971):

> "In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested *must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places." Id.* at 29 L.Ed.2d 290; emphasis added.

Cohen thus preserves, while the decision here below would forfeit, the basic due process rights of fair notice and hearing on a specified charge enunciated in *Cole v. Arkansas,* 333 U.S. 196 (1948). As the Court held in *Bouie*

v. Columbia, 378 U.S. 347 (1964):

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language *but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language*. As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, "judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness." *Id.* at 352; emphasis added.

Moreover, Washington has undertaken this remarkable *ex post facto* extension of its obscenity statute on the basis of a factual record which falls far short of showing the "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it" mentioned in *Redrup, supra*, 386 U.S. at 769.

The court's opinion eliminates the presence of juveniles voluntarily watching the film through the fence as a basis for affirmance, on the ground that the state had not yet passed a statute specifically directed to juveniles.[7] (App. 37). (It is not explained why the absence of a statute should not be equally fatal to the invasion-of-privacy argument.) The opinion also appears to eliminate the privacy of passing motorists as a ground of decision, since they would obtain only short glimpses of the screen (App. 35). Thus the decision rests solely upon the supposed privacy interests of householders having the screen in sight (App. 35-36).

Yet the occupants of houses in the vicinity would obviously have but a silent view of a distant screen, and would

7. It has since done so, RCW 9.68.060.

watch the images thereon, beyond an occasional glimpse, only to the extent that they chose to do so. Totally absent here is the kind of inescapable intrusion involved in such cases as *Breard v. City of Alexandria* and *Kovacs v. Cooper, supra.* And paradoxically, under the court's "individual scenes" concept of obscenity, the householder who took time to watch the *entire film* through his window would presumably restore the work to constitutional protection.

Here, the record shows no complaints about the film from householders or anyone else. There is no evidence that anyone from a nearby house even saw any part of the picture. Petitioner's conviction thus rests upon the assumption that someone in a neighboring house *might* have seen the film, and *might* have felt his privacy invaded by it. But here, as in *Cohen v. California, supra,*

> . . . the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense. *Id.*, 29 L.Ed.2d at 291.

The foregoing infirmity in the opinion below is recognized by Justices Finley and Neill, who concur in the result.[8] They conclude that the majority's rationale is in error because:

> "Decisions of the federal courts in the area here involved seem to me to indicate that the First Amendment rights cannot be circumscribed absent clear proof of an *actual assault* upon the rights of a nonconsenting individual." (App. 43; emphasis in original)

8. The concurrence is on the ground of alleged "pandering" within the meaning of *Ginzburg v. United States,* 383 U.S. 463 (1966). That view, not shared by the majority below, is insupportable because (a) the film does not present a "close case" as to obscenity, and (b) there is no evidence whatever of record concerning its advertising or promotion.

To uphold the majority's judicial extension of a narrowly drawn statute would effectively subject speech to the chilling prospect of regulation unpredictable in both time and extent.

3. Question Three

The Washington Supreme Court held that the *ex parte* hearing which the justice of the peace conducted prior to issuing an arrest warrant satisfied the requirements established by this Court for the seizure of allegedly obscene materials. That hearing consisted entirely of testimony by one police officer who had never seen the entire motion picture and who was unable to testify regarding the thematic content of the film because he viewed it from outside the theatre grounds and did not hear the sound track. The officer's testimony accordingly was limited to a verbal description of isolated scenes (App. 47-48).

The justice of the peace issued the warrant solely upon the basis of this testimony; he did not view the film himself. In fact, the magistrate failed even to issue a *search* warrant which described in detail the film to be seized, as required by the Fourth Amendment, *Marron v. U.S.*, 275 U.S. 192 (1927). Rather, he merely issued a warrant for the arrest of "John Doe," and left it to the officers to carry it out and to seize the film in the process.

In *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961), this Court held that the First and Fourteenth Amendments require that a magistrate utilize a "procedure . . . designed to focus searchingly on the question of obscenity" before he issues a warrant for the seizure of allegedly obscene publications. Three years later the Court held that the requirement of a searching inquiry into the

question of obscenity can be fulfilled only by affording an opportunity for a pre-seizure adversary hearing. *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964). The same standard of a searching inquiry has been held applicable in the case of an evidentiary seizure of a motion picture film, although the Court has not yet been required to decide whether the standard invariably calls for a pre-seizure adversary hearing in such cases. *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

The constitutional requirement of a *searching* inquiry can be satisfied only in the context of a contested, adversary hearing. The absence of anything resembling such inquiry here is striking evidence that only an adversary process can ensure that the attention of the magistrate will be directed to the relevant legal principles, and that he will not issue a warrant without consideration of its impact upon protected First Amendment rights.

Even by *ex parte* standards, the procedure followed here was deficient. At the very least, a hearing cannot constitute a "searching inquiry" unless testimony is received from one who has seen, and heard, the entire motion picture, or unless the magistrate himself views the film before issuing the warrant. *Marcus v. Property Search Warrant*, 367 U.S. 717, 731-32 (1961).

The Washington Supreme Court held that *Marcus* and *A Quantity of Books* require a pre-seizure adversary hearing only when, as in those cases, a warrant is sought for the seizure of large numbers of publications in the course of civil proceedings looking toward their destruction. The Court reasoned that the seizure of "Carmen Baby" for use as evidence in petitioner's criminal prosecution involved

only a "temporary" restraint of a single motion picture film and that the length and scope of the restraint imposed by the seizure, and the danger that nonobscene items would be seized, were therefore considerably less than in *Marcus* and *A Quantity of Books*. The Court did, however, note that state and federal appellate decisions are in direct conflict on this question. Several state courts have reached the same conclusion as the Washington Court. *Bloss v. Michigan*, 171 N.W.2d 455 (Mich.App. 1969), reversed on other grounds, 29 L.Ed.2d 106 (1971); *Commonwealth v. State Amusement Corp.*, 248 N.E.2d 497 (Mass. 1969); *People v. DeRenzy*, 79 Cal.Rptr. 777 (Cal.App. 1969); *Monica Theater v. Municipal Court*, 88 Cal.Rptr. 71 (Cal. App. 1970). On the other hand, federal circuit courts have held that an adversary hearing is required before evidentiary seizure of a film can be made. *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), reversed on other grounds, 28 L.Ed.2d 528 (1971); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293 (2nd Cir. 1970); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1970).

The Washington court has vastly underestimated the extent to which the arrest of a film exhibitor and evidentiary seizure of his film can restrain the exercise of First Amendment rights. Characterization of such a seizure as "temporary" ignores the fact that criminal prosecutions may involve restraints on dissemination for periods of time substantially beyond the maximum period of restraint considered constitutionally permissible in other contexts. *United States v. Thirty-Seven Photographs*, 28 L.Ed.2d 831 (1971).

For example, here more than six months elapsed between the seizure and petitioner's trial *de novo* in Superior Court, and more than a year between the seizure and the trial court's entry of findings and judgment. During all of that time the film was impounded and its exhibition prevented —a far longer period than the seventy-four day maximum set by the Court in *Thirty-Seven Photographs, supra* (Tr. 10). Yet the superior court, and later the Washington Supreme Court, held in effect that "Carmen Baby" *was* capable of lawful dissemination to the public (for example, in an indoor theatre or an outdoor theatre enclosed by an opaque fence). Thus the lack of any adequate pre-seizure hearing effectivly contributed to the suppression of a non-obscene film for a period of a year at the trial court level—precisely the danger which caused this Court to require a pre-seizure adversary hearing in *A Quantity of Books v. Kansas*, 378 U.S. 205, 211 (1964).

Furthermore, it is incorrect to assume, as the Washington court has done, that the scope of the suppression is small when only a single copy of a film is seized. A film such as "Carmen Baby" which is held for public exhibition, unlike a single book, is directed at all those who would be in the audience—not at a single purchaser. "Preventing this number of persons from viewing a film is certainly equivalent to seizing all copies of a book from the newsdealers involved in *A Quantity of Books. . . .*" *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 295 (2d Cir. 1970).

Even assuming that the exhibitor could obtain another film print—which is unlikely in a small city such as Richland, Washington—the fact of his previous arrest would certainly deter him, and other exhibitors in the area, from obtaining and showing another print until the final judicial

determination of its protected character. Arrest and seizure therefore equal complete suppression. "Functionally an arrest resembles a non-judicially imposed injunction against certain conduct. . . ." H. Monaghan, *First Amendment Due Process,* 83 Harv.L.Rev. 518 (1970).

Seizure without an adversary hearing—particularly when a film admittedly suitable for dissemination to adults is effectively censored in toto for months on end—is a classic example of the kind of excessive regulatory technique which was emphatically rejected in *Butler v. Michigan,* 352 U.S. 380 (1957). A ruling by this Court on the point would be of major constitutional importance.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,
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BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

Respondent, State of Washington, prays that the Court deny the Petition for Writ of Certiorari to review the judgment of the Supreme Court of the State of Washington entered May 6, 1971, which affirmed petitioner's conviction for exhibiting an obscene motion picture.

COUNTER — STATEMENT OF THE CASE

On August 30, 1968, a Richland police sergeant testified during a hearing conducted by Justice of the Peace Albert J. Yencopal concerning various scenes of the movie "Carmen Baby" which was then playing at a drive-in theater located in a residential area of Richland, Washington.

The purpose of the hearing was to determine if there was probable cause for the issuance of an arrest warrant for the manager of the drive-in theater (App. 47) for violation of Section 9.68.010, Revised Code of Washington, which provides:

> "9.68.010 Obscene literature, shows, etc. Every person who —
>
> (1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene, or
>
> (2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> Shall be guilty of a gross misdemeanor."

At the hearing, only a portion of which was transcribed, Justice of the Peace Yencopal, judicially scrutinized the complainant about the movie (App. 2) in a procedure designed to focus searchingly on the question of obscenity (App. 3). The police sergeant had previously viewed a portion of the movie on August 28, 1968, from outside the chain link fence enclosing the theater and practically the entire movie on August 29, 1968, from outside the theater in the company of the city attorney.

Upon a finding of probable cause an arrest warrant was issued and executed with the arrest of petitioner. As an incident to the arrest, and for evidentiary purposes, the film "Carmen Baby" was seized by the arresting officers.

The following is a chronological summary of the proceedings in Justice Court:

(1) On September 3, 1968, petitioner appeared in Justice Court with his counsel and entered a plea of not guilty along with a motion to dismiss which was taken under advisement (Tr. 23).

(2) On September 6, 1968, the case was continued without objection to September 13, 1968 (Tr. 24).

(3) On September 13, 1968, the motion to dismiss was denied (Tr. 24).

(4) On September 19, 1968, petitioner filed a motion to suppress (App. 51) which was followed by supporting and opposing briefs.

(5) Justice of the Peace Yencopal denied the motion to supress by written Order dated September 27, 1968 (App. 1-4).

(6) Trial was held October 3, 1968, before Justice of the Peace Yencopal sitting without a jury (Tr. 24) and petitioner was thereafter convicted of a violation of RCW 9:68.010.

Subsequently, petitioner gave notice of appeal and

the appeal process followed with a trial de novo in Superior Court resulting in petitioner's conviction based on the context of the movie's exhibition. On appeal the Supreme Court of the State of Washington affirmed.

ARGUMENT

The Petition for Writ of Certiorari should be denied for the reason that the court below considered and correctly interpreted the applicable decisions of this Court. The opinion (App. 21-38) of the court below is in accord with those decisions and settled principles of law. Furthermore, Respondent believes that this case lacks sufficient significance beyond its own facts to justify a further ennunication of those principles.

ARGUMENT AND ANSWER TO PETITIONER'S FIRST AND SECOND QUESTIONS

Petitioner questions whether he should be convicted under Washington's obscenity law when a movie containing erotic sex scenes is commercially exhibited by him in a drive-in theater in a manner permitting unwitting and unwilling persons to view portions out of context and in a manner which intrudes upon the privacy of non-consenting residents of nearby homes.

Assuming, *arguendo,* that the movie taken as a whole might not be obscene according to the guidelines established by this Court in *Roth v. United States,* 354 U.S. 476 (1957), numerous decisions of this Court and views of its members support the proposition that the setting

in which a material is placed, the manner of use and context in which it is displayed or viewed are relevant to the determination of obscenity. See *Redrup v. New York,* 386 U.S. 767 (1967), *Ginsberg v. United States,* 383 U.S. 463 (1966), *Stanley v. Georgia,* 394 U.S. 557 (1969), *Kingsley Books, Inc., v. Brown,* 354 U.S. 436, (dissenting opinion of Warren, C. J.), *Roth v. United States, supra,* (concurring opinion of Warren, C. J.), *Ginsberg v. United States, supra,* (dissenting opinion of Stewart, J. and footnote at page 649), *Mishkin v. New York,* 383 U.S. 502 (1966), and *A Book Named "John Cleland's Memoirs of a Woman of Pleasure" v. Attorney General of Mass.,* 383 U.S. 413, 420 (1966).

This Court has also recognized a distinction between motion pictures and other forms of publication. Motion pictures, though within the basic protection of the first amendment, are not necessarily subject to the precise rules governing other methods of expression, *Freedman v. Maryland,* 380 U.S. 51 (1961) and because of visual impact, motion pictures of sexual scenes may transcend the bounds of constitutional guarantee long before a frank description of the same scenes in written words, *Landau v. Fording,* 245 Cal. App. 2d 820, 54 Cal Rptr. 177, *aff'd per curiam,* 388 U.S. 456. These distinctions peculiar to motion pictures suggest that the particular use or contextual exhibition is even more important in a determination of obscenity in the case of motion pictures. The court below relied in part on *Redrup, supra,* concerning "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure

to it". The case herein involves a drive-in theater exhibition which illuminates the nighttime sky of a residential area with a vivid portrayal of erotic sexual scenes. This is most certainly an obtrusive display practically impossible for residents and guests in nearby homes to avoid.

The holding of *Redrup, supra,* was reaffirmed in *Stanley v. Georgia,* 394 U.S. 557 (1969) and *United States v. Reidel,* 91 S. Ct. 1410 (1971) (concurring opinion of Marshall, J.).

Petitioner cites *Cohen v. California,* 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971) in support of his petition for review. However, a reading of *Cohen* clearly indicates that it is distinguishable from the case herein. In *Cohen* this Court specifically pointed out that it was not an obscenity case and stated:

> "Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some way, erotic. Roth v. United States, 354 U.S. 476."

Cohen also recognized a distinction between an unwitting viewer outside his home and one within the privacy of his home. It was the residents within their own homes that the court below correctly considered in reference to the obtrusive assault on their individual privacy.

ARGUMENT AND ANSWER TO PETITIONER'S THIRD QUESTION

The Washington State Supreme Court has carefully

and thoroughly reviewed the decisions pertaining to the procedures necessary to seize allegedly obscene material for evidentiary purposes. The opinion of the court below appears to be in accord with applicable decisions of this Court which are *Marcus v. Search Warrant of Property,* 367 U.S. 717 (1961), *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964) and *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968). The interpretation of the lower court is clearly ennunciated in its opinion set out in the appendix at pages 23-28. It is unnecessary to reiterate that analysis here.

Respondent believes a distinction should be made between a prior restraint aimed at suppression of large quantities of material as existed in *Marcus* and *A Quantity of Books* and a seizure for evidentiary purposes as existed in *Lee Art Theatre* and the case herein. If material is necessary for evidentiary purposes, it is quite easy to secure by purchasing a single copy of a book or magazine but impossible in the case of a motion picture.

Lee Art Theatre did not require a prior adversary hearing before seizure of a motion picture, but while recognizing First Amendment safeguards, did hold that seizure must be preceded by a judicial inquiry "designed to focus searchingly on the question of obscenity". This Court recognized the problems peculiar to motion pictures in determining "that a judge may read a copy of a book in a courtroom or chambers but not as easily arrange to see a motion picture there".

The procedures followed in the instant case clearly

meet constitutional safeguards and requirements of *Lee Art Theatre*. The justice of the peace conducting the inquiry has indicated:

> "Even though I followed the procedures formulated by the Supreme Court, I was not aware of them at the time I did this. I did this on my own initiative — so as not to consider lightly charges made involving matters normally guaranteed under the free speech amendment. I did *judicially scrutinize* the complainant about the movie before I issued the warrant. I did this in light of determining if there was probable cause to make an arrest for showing an obscene movie — *obscene as defined by the Supreme Court in Roth vs. United States*, 354 U.S. 476 . . . the purpose of the probable cause hearing was a procedure designed to focus searchingly on the question of obscenity.". (App. 2) (Emphasis added)

The justice of the peace did not accept the mere conclusions of the officer nor merely an affidavit from him, but rather took testimony regarding specific scenes of the movie and its content during a hearing only part of which was transcribed (App. 2).

The decisions of this Court do not support petitioner's contention that a full adversary hearing is necessary prior to seizure of a motion picture film. Assuming such a procedure were possible, then it would be unnecessary to seize the film at all as the issues would have been judicially resolved. Such a requirement would as Mr. Justice Harlan has stated: "Make ad-

judication not merely 'not as easily arranged' in the case of movies but quite impossible".

Petitioner also argues that the length of time this film has been impounded is a restraint of First Amendment rights, citing *United States v. Thirty-Seven Photographs,* 28 L. Ed. 2d 831 (1971). Petitioner fails to recognize that his case was tried by the justice court on October 3, 1968, some thirty-four (34) days after the arrest and seizure. The chronological proceedings previously set out herein, show the various motions which necessarily precluded an earlier disposition. Certainly the time required by the appeal process should not be a deciding factor. *Freedman v. Maryland,* 380 U.S. 51, 60 (1961) limited to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of prompt, final, judicial determination, and *Thirty-Seven Photographs, supra,* suggested a seventy-four (74) day maximum. Petitioner's trial in justice court was held within thirty-four (34) days and a judicial determination entered within thirty-eight (38) days. See *Byrne v. Karalexis,* 27 L. Ed. 2d 792 (1971) and Mr. Justice Brennan's opinion joined by Mr. Justice White and Mr. Justice Marshall stating, "Freedman was satisfied by a 'prompt judicial decision *by the trial court*' ".

CONCLUSION

Respondent submits on the basis of the settled principles set out herein that the decision of the court below

is in accord with applicable decision of this Court and there is no need for further review.

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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SUPREME COURT, U. S.
MOTION FILED
DEC - 8 1971

IN THE

Supreme Court of the United States

October Term, 1971
No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Certiorari to the Supreme Court of the State of Washington.

Motion for Leave to File Brief Amicus Curiae on Behalf of the National Association of Theatre Owners, Inc., and Brief Amicus Curiae.

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IN THE

Supreme Court of the United States

October Term, 1971
No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent.

On Certiorari to the Supreme Court of the State of Washington.

Motion of the National Association of Theatre Owners, Inc., for Leave to File Brief Amicus Curiae.

The National Association of Theatre Owners, Inc., referred to hereafter as NATO, respectfully moves for leave to file a brief amicus curiae in this case. Petitioner's attorney has consented to the filing of this brief; the attorney for the respondent is unwilling to consent.

The National Association of Theatre Owners, Inc., is the largest trade association of exhibitors of motion picture films in the United States. NATO has regional offices in virtually all of the fifty states, each of the regional offices electing delegates to the National Association. The headquarters of NATO are in New York City, with officers elected by a Board of Directors at an annual meeting for one year's service. Among the

purposes and objectives of NATO is to cultivate the highest possible standards in all matters relating generally to the motion picture industry, and in particular to the exhibition of motion picture films. The aim of the organization is to see to it that the exhibition of motion picture films is always consistent with the public interest.

The case herein presents issues of crucial significance in the areas of free speech and press and due process of law, affecting the interests of the viewing community as well as the exhibitors of motion picture films. The Court has held that liberty of expression by means of motion pictures is guaranteed by the Constitution; that the basic principles of freedom of speech and press do not vary; and that freedom of expression is in all cases the rule.

NATO believes that the issues to which our brief is addressed are extremely important, not only in terms of the strict standards for judging obscenity enunciated by the Court, but in terms of all aspects of the First Amendment. For if motion picture films may be seized and suppressed without a prior adversary hearing before a judicial officer, then the danger of abridgment of the right of the public in a free society to unobstructed circulation and exhibition of constitutionally protected expression in all areas is manifest. If state criminal statutes which purport to prohibit the exhibition of obscene motion picture films can be invoked to impose sanctions upon exhibitors of nonobscene films, solely upon the ground that some of the depictions or representations in the films may be "offensive" to unknown members of the public, then freedom of expression in all areas of public concern will be seriously affected and undermined.

NATO believes that the doctrinal standards enunciated by this Court in the light of the requirements of the First Amendment are opposed to the *ex parte* suppression of material ordinarily entitled to constitutional protection. The essence of ordered liberty is an opportunity to be heard before condemnation. Moreover, NATO believes that limitations upon the exhibition of films containing ideas, informational or entertaining, merely because such expression may be deemed offensive by some unknown viewer, is a threat to the entire system of free expression. The obscenity exception to the First Amendment should not be broadened into a wide-ranging formula for governmental censorship. Sanctions resting on a generalized, standardless version of "offensiveness" should not be upheld if the vitality of the First Amendment guarantees are to be maintained.

NATO believes that this amicus brief will be of assistance to the Court by pointing out the developing constitutional standards and doctrinal developments in the free speech and press and due process areas which are opposed to *ex parte* and arbitrary and capricious suppression of expression. For these reasons, NATO respectfully requests leave to file the within brief *amicus curiae*.

Respectfully submitted,

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Attorneys for Movant.

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On Certiorari to the Supreme Court of the State of Washington.

BRIEF AMICUS.

Interest of Amicus.

The interest of Amicus is set out in the preceding motion for leave to file this brief.

Questions Presented.

This brief is addressed, first, to the issue of whether the seizure and suppression of motion picture films, without a prior adversary hearing to determine the alleged obscenity of the films seized, is violative of the First Amendment; and, second, to the issue of whether, consistent with the free speech and press and due process guarantees of the First and Fourteenth Amendments, criminal sanctions may be imposed under a general obscenity statute upon the exhibitor of a motion picture film entitled to constitutional protection, solely because some hypothetical person may deem some part of the film "offensive" or an invasion of "privacy".

ARGUMENT.

I.

The Seizure and Suppression of a Motion Picture Film, Without a Prior Adversary Hearing to Determine the Alleged Obscenity of the Film Seized, Constitutes a Prior Restraint on the Exercise of Freedom of Expression, in Violation of the Free Speech and Press, Due Process, and Search and Seizure Provisions of the First, Fourth and Fourteenth Amendments and the Interpretive Decisions of the Court.

The guarantee of a right to free speech and press makes any seizure of allegedly obscene expression a unique constitutional issue. The Court has held that a State is not free to adopt whatever procedures it pleases for dealing with obscenity, without regard to the possible consequences for constitutionally protected speech; that the line between speech unconditionally guaranteed and speech which may legitimately be regulated is finely drawn; and that the separation of legitimate from illegitimate speech calls for sensitive tools. *Marcus v. Search Warrants of Property*, 367 U.S. 717, 731; *Speiser v. Randall*, 357 U.S. 513, 525.

In the discussion which follows, we examine, first, the constitutional principles embodied in the "due process" precept that an individual is guaranteed a right to notice and hearing before he is deprived of a significant property interest. It appears clear from the decided cases that the root requirement under the due process provisions of the Constitution is that an individual be given an opportunity for a hearing before he is deprived of any significant property interest. Following this discussion, we turn to the precedents which demonstrate the abhorrence of *ex parte* restraints

in the First Amendment area. For here the issue is not only the vindication of individual rights, but the right of the public to unobstructed dissemination of constitutionally protected expression. We are dealing with freedom of expression, an indispensable condition of nearly every other freedom, where history and constitutional text combine to support the view that all media of communication must be left free, "without censorship, injunctions or prior restraints". Justice Black, concurring in *New York Times Co. v. United States*, 91 S. Ct. 2140, 2143.

1. It is generally accepted as fundamental to procedural due process that a person be afforded "notice and an opportunity to be heard" before he may be deprived of life, liberty or property. The mainstream of the procedural due process decisions of the courts is the recognition that the most fundamental ingredient of the due process guarantee is "a meaningful opportunity to be heard". Thus, while it is customary today to begin discussion of this principle with *Sniadach v. Family Finance Corp.*, 395 U.S. 337, it is important to emphasize that the *Sniadach* opinion did not establish a new constitutional rule, but simply brought traditional procedural due process analysis, worked out over many decades of constitutional litigation, to bear upon the question at issue in the case. "Early in our jurisprudence" it was held that "due process of law signifies a right to be heard in one's defense". *Boddie v. Connecticut*, 91 S. Ct, 780, 785-786.

In *Sniadach*, the Wisconsin prejudgment garnishment procedure was held violative of the fundamental principles of due process because of the absence of notice and prior hearing to the garnishee. Concurring.

Justice Harlan stated, ". . . that due process is afforded only by the kinds of 'notice' and 'hearing' which are aimed at establishing the validity, or at least the probable validity, of the underlying claim against the alleged debtor *before* he can be deprived of his property or its unrestricted use". 395 U.S. at 343. In *Goldberg v. Kelly,* 397 U.S. 254, the Court held that procedural due process required that a welfare recipient be afforded an opportunity to be heard before his welfare payments could be terminated. Justice Brennan, writing for the Court, noted that a crucial factor in the context of the case was that termination of said pending resolution of a controversy over eligibility "may deprive an *eligible* recipient of the very means by which to live while he waits. . . . In the present context these [due process] principles require that a recipient have timely and adequate notice detailing the reasons for a proposed termination, and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally". 397 U.S. at 264, 267-268. In *Boddie v. Connecticut,* the Court held that due process of law prohibited a State from denying indigents access to the courts solely because of inability to pay court fees and costs in divorce actions. In the course of the opinion, Justice Harlan held that "a State must afford to all individuals a meaningful opportunity to be heard if it is to fulfill the promise of the Due Process Clause". 91 S. Ct. at 787.

Other recent decisions have continued this far-reaching trend. *Wisconsin v. Constantineau,* 400 U.S. 433 (state statute authorizing the posting in liquor outlets of a notice prohibiting sale of liquor to specified individuals, without notice or hearing prior to posting,

held unconstitutional as constituting denial of procedural due process); *Hall v. Garson,* 430 F. 2d 430 (5 Cir. 1970) (Texas statute giving landlord a lien on personal goods of tenants and authorizing landlord to enforce that lien by peremptory seizure of the property raised due process issue under the Constitution; *Escalera v. New York City Housing Authority,* 425 F. 2d 853 (2 Cir. 1970), cert. denied 400 U.S. 853, (Tenant in public housing project deprived of his continued tenancy without affording him adequate procedural safeguards raises appropriate constitutional claim in federal court; *Santiago v. McElroy,* 319 F. Supp. 284 (E.D. Pa. 1970), (Distress sales under distraint procedure of Pennsylvania Landlord and Tenant Act amounted to a taking of property without procedural due process since sales did not follow a hearing of some sort before the tenant was deprived of his property); *Klim v. Jones,* 315 F. Supp. 109 (N.D. Cal. 1970), (California Innkeeper's Lien Law held constitutionally infirm for failure to provide for any sort of hearing prior to the imposition of the innkeeper's lien thereunder). See also, *Randone v. Appellate Department,* 5 Cal. 3d 536, 488 P. 2d 13, 96 Cal. Rptr. 709 (1971), (California pre-judgment attachment procedure violates due process because procedures permit attachment of property without prior notice or hearing upon filing of an action).

2. More than private interest in property is affected by governmental action when suppression of any medium of communication is involved. In such case the public's right to know, the public's right to hear, the public's right to view is also in balance. The stakes are higher in a self-governing society when the exercise of freedoms of speech and press are affected.

It follows therefore that a "system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity." *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70; *Freedman v. Maryland*, 380 U.S. 51, 57. Thus, in *Carroll v. President and Commissioners of Princess Anne*, 393 U.S. 175, the Court held that the issuanee of a ten day injunction restraining members of a political party from holding rallies was incompatible with the freedom of speech provisions of the First Amendment. The Court stated that "there is no place within the area of basic freedoms guaranteed by the First Amendment for such orders where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." 393 U.S. at 180. The Court added the following salient observations:

> "The value of a judicial proceeding, as against self-help by the police, is substantially diluted where the process is ex parte, because the Court does not have available the fundamental instrument for judicial judgment: an adversary proceeding in which both parties may participate. The facts in any case involving a public demonstration are difficult to ascertain and even more difficult to evaluate. Judgment as to whether the facts justify the use of the drastic power of injunction necessarily turns on subtle and controversial considerations and upon a delicate assessment of the particular situation in light of legal standards which are inescapably imprecise. In the absence of evidence and argument offered by both sides and of their participation in the formulation of value judgments, there is insufficient assurance of the

balanced analysis and careful conclusions which are essential in the area of First Amendment adjudication." 393 U.S. at 183.

With respect to the *ex parte* seizure and suppression of films, books, magazines and other media of communication, the Court's rulings, and the decisions of the lower courts which followed, have been undeviating. The fundamental postulant of the decisions has been that the seizure and suppression of expression, without a prior adversary hearing to determine the alleged obscenity of the particular communication seized, constitutes a prior restraint on the exercise of freedoms of speech and press in violation of the First and Fourteenth Amendments. In *Marcus v. Search Warrants of Property*, 367 U.S. 717, 736, the Court observed that no prior decision of the Court supported the proposition that a State could impose extensive restraints on the distribution of publications prior to an adversary proceeding on the issue of obscenity, irrespective of whether or not the material was legally obscene. In *Quantity of Copies of Books v. Kansas*, 378 U.S. 205, the Court concluded "that in not first affording P-K an adversary hearing, the procedure leading to the seizure order was constitutionally deficient." 378 U.S. at 211.

The *Books* ruling was followed in *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2 Cir. 1969), cert. denied 397 U.S. 920; *Tyrone, Inc. v. Wilkinson*, 410 F. 2d 639 (4 Cir. 1969), cert. denied 396 U.S. 985; *208 Cinema, Inc. v. Vergari*, 298 F. Supp. 1175 (D.C. N.Y. 1969), reversed in open court Oct. 9, 1969, ... F. 2d .... (2 Cir.) Docket No. 33997, cert. denied 397 U.S. 934; *United States v. Alexander*, 428

F. 2d 1169 (8 Cir. 1970); *Wilhelm v. Turner,* 431 F. 2d 177 (8 Cir. 1970), cert. denied *sub nom. Turner v. Wilhelm,* 91 S. Ct. 919 (March 1 ,1971); *Cambist Films, Inc. v. Duggan,* 420 F. 2d 687 (3 Cir. 1969); *Metzger v. Pearcy,* 393 F. 2d 202 (7 Cir. 1968); *Demich, Inc. v. Ferdon,* 426 F. 2d 643 (9 Cir. 1970), vacated and remanded 91 S. Ct. 1223.

At least six courts of appeals as aforestated, and many district courts, have stated that the requirement of a prior adversary hearing applies to film seizures as well as those of printed matter because there is the same danger of abridging the right of the public to unobstructed access to non-obscene expression. A distillation of the views expressed by the courts indicates a firm belief that a prior adversary hearing, rather than an *ex parte* proceeding, is essential in cases involving alleged obscenity. An adversary hearing achieves accurate factual and legal determinations; it facilitates close judicial scrutiny of the material; it assures attention to the relevant legal principles; and makes certain that seizure or injunction will be limited only to those items found to be obscene. The adversary proceeding thus avoids seizure and suppression of non-obscene material; minimizes the financial burdens of a seizure from a person's business; and of course insures the public's right to unobstructed viewing and reading of constitutionally protected matter.

If First Amendment rights are to be preserved the requirement of an adversary hearing should not turn on the question of whether or not there has been a "massive" seizure of allegedly obscene material. To make the right to an adversary hearing dependent upon the quantity of material seized would clearly under-

mine constitutional rights. The term "massive" should not be defined in terms of the quantitative measure of the items seized, but rather of the audience reached. "Appellants argue that there is a difference between the seizure of a large number of books and the seizure of a single print of a motion picture film. We do not agree that the difference is legally significant. We are told that the Bethview Theater has 300 seats. Assuming half of them to be occupied for four showings of a film each day for a week, over 4000 individuals would see the film. Preventing so large a group in the community from access to a film is no different, in the light of first amendment rights, from preventing a similarly large number of books from being circulated." *Bethview Amusement Corp. v. Cahn,* 416 F. 2d 410, 412 (2 Cir. 1969), cert. denied 397 U.S. 920. If the effect of a seizure is to deprive members of the public to access to the matter involved then it is submitted an adversary hearing should be required if First Amendment rights are to be maintained.

There does not appear to be any overriding considerations which would justify the denial of a prior adversary hearing in a case involving the seizure of a motion picture film exhibited to the general public. The seizure of material in connection with the investigation of alleged violations of an obscenity law should not obviate the need for a prior adversary hearing. The decisions of the courts have shown that there are ample means available to a prosecutor to assure that evidence will be available in the event of the institution of criminal proceedings.

> "It is frequently suggested, and the Government so argues, that dealers in obscenity will be effec-

tively immunized from prosecution if a prior adversary hearing is required in cases such as this. Several courts have faced this contention, and have demonstrated that a number of methods for the securing of evidence remain available to prosecutors. See, e.g., Metzger v. Pearcy, 393 F.2d 202 (7 Cir. 1968); Tyrone, Inc. v. Wilkinson, 410 F.2d 639 (4th Cir. 1969); Bethview Amusement Corp. v. Cahn, 416 F.2d 410 (2d Cir. 1969); Sokolic v. Ryan, 304 F.Supp. 213 (S.D. Ga. 1969); Gregory v. DiFlorio, 298 F.Supp. 1360 (W.D. N.Y. 1969). See also Kingsley Books, Inc. v. Brown, 354 U.S. 436, 77 S.Ct. 1325, 1 L.Ed.2d 1469 (1957). We believe these cases answer the Government's concern." *United States v. Alexander*, 428 F.2d 1169, 1176 (8 Cir. 1970).

It is submitted that an adversary hearing prior to seizure or suppression of materials ordinarily entitled to constitutional protection is a vital necessity for assuring that neither the public nor the exhibitor will be deprived of a motion picture film which is entitled to constitutional protection under the First Amendment. A prior adversary hearing is that "sensitive tool" which insures the separation of legitimate from illegitimate speech and press.

II.

The Imposition of Criminal Sanctions Under a State General Obscenity Statute, as Construed and Applied to the Exhibition of a Nonobscene Motion Picture Film, Upon the Ground That Excerpts From the Film May Be "Offensive" or Invade the "Privacy" of Some Unknown Viewer, Abridges the Exercise of Freedoms of Speech and Press and Arbitrarily Deprives Persons of Liberty and Property Without Due Process of Law, Contrary to the Provisions of the First and Fourteenth Amendments and the Interpretive Decisions of the Court.

While the discussion by Amicus here is concerned principally with the doctrinal considerations which should govern determination of causes such as the one herein involved, it should be stated initially that the particular record here would support petitioner's contentions that the judgment of conviction should be reversed. In the light of the decisions of the Court, the motion picture film here involved is not obscene and is entitled to constitutional protection. The state court below virtually conceded as much when it stated that the film "probably would pass the definitional obscenity test if the viewing audience consisted only of consenting adults". (App. 90). Thus, the general obscenity statute has been applied to a nonobscene film solely upon the ground that excerpts of the film might be deemed "offensive" to some unknown viewer and an invasion of his alleged "privacy". This has been done by the State without any prior notice by way of statute or charge and without any evidence to support even

such a vague and subjective standard. There is not the slightest evidence in the record of "pandering", nor the slightest evidence that any person was offended by any excerpt from the film or by the film in its entirety. Even under a specific statute with specific prohibitions and particular definitions, it is doubtful that the determination of what is offensive can be left to the sole discretion of each person who may be confronted with a display which he finds objectionable. In the case herein, however, there was no specific statute and no person who claimed an intrusion into his sensibilities by the exhibition of the film. The judgment of conviction here is unsupported by any evidence of guilt, and therefore should not stand in the light of due process requirements of the Constitution. *Thompson v. City of Louisville,* 362 U.S. 199; *Garner v. Louisiana,* 368 U.S. 157; *Shuttlesworth v. Birmingham,* 382 U.S. 87.

1. One of the dangers to the exercise of freedoms of speech and press which flows from the ruling of the court below is the revival of the *Hicklin* test for judging obscenity, rejected by this Court "as unconstitutionally restrictive of the freedoms of speech and press". *Roth v. United States,* 354 U.S. 476, 489. The Court rejected the "most susceptible person" standard as well as the "isolated passages" test of the old English rule. Material, therefore, must be judged as a whole instead of by its parts, and it must be judged by its impact on average persons, not the highly susceptible.

A general obscenity statute which is used by a State to impose criminal sanctions upon the exhibitor of a motion picture film shown to the general public in a drive-in theater, merely because some hypothetical "non-consenting citizen" (App. 88) may deem some scene

in the film "offensive" or an invasion of "privacy", is not legislation "reasonably restricted to the evil with which it is said to deal". *Butler v. Michigan*, 352 U.S. 380, 383. In effect, the general public is being prohibited from seeing a constitutionally protected film in order to safeguard some hypothetical person who does not wish to be offended. The incidence of the ruling of the court below is to reduce the adult population of Washington to viewing only what is acceptable to the hypothetical "nonconsenting citizen". The statute therefore arbitrarily curtails the exercise of freedoms of speech and press and capriciously obstructs the access of the public to constitutionally protected material, in violation of the First and Fourteenth Amendments.

Reliance upon "a 'contextual' approach to materials not strictly definable as obscene" (App. 91) means no more, it is submitted, than the denial of constitutionally protected material to the general public, simply because the material may be deemed deleterious to some peripheral members of the community not typical of the general public. The invocation of such a rule under a general obscenity statute is no more than a return to *Hicklin*. A State cannot bar the exhibition of nonobscene motion picture films entitled to constitutional protection, shown to the public generally, by asserting the supposed "offensiveness" to some unknown member of the community. Such a hypothetical person cannot be used, it is submitted, as a justification for prohibition and the imposition of criminal sanctions under a general obscenity statute assumedly constricted to the constitutional standards for judging obscenity enunciated by the Court.

2. A concurring opinion in the court below rejects the "contextual" approach because the record was barren of proof of any actual assault upon the rights of a nonconsenting individual, emphasizing that "there seems to be no indication that, in fact, the individual privacy of any homeowner or passing motorist was assaulted" (App. 103). Nevertheless, concurrence is predicated upon the doctrine of "pandering".

Reliance upon "pandering" under a general obscenity statute, without specific prohibition and without specific charge to justify a criminal prosecution, represents another hazard to the exercise of freedoms of speech and press under the First and Fourteenth Amendments. The use of this talismanic label in the obscenity area has led in most cases to the opening of the door wider for a standard based on the personal predilections of judge or jury. In essence, the generalized language of the Court in *Ginzburg v. United States,* 383 U.S. 463, has been used to suppress material concededly nonobscene and entitled to constitutional protection. In similar fashion, the precise holding in *Mishkin v. New York,* 383 U.S. 502, has been transformed into a means of punishing and suppressing nonobscene material under a vague and ambiguous concept of "variable obscenity". The Court has indicated since *Ginzburg* that the cases are rare in which evidence of the sort of "pandering" which the Court found significant in *Ginzburg* exists. This is so because the essence of *Ginzburg* was that with respect to the material in that case, the petitioners "proclaimed its obscenity" (383 U.S. at 472). The Court since *Ginzburg,* and particularly in *Redrup v. New York,* 386 U.S. 767, and the cases which followed, has made it clear that the pandering test is to be applied only in the rare case where the

evidence clearly, convincingly and unequivocally establishes that the accused "proclaimed the obscenity" of the material. See, *United States v. Baranov*, 418 F. 2d 1051 (9 Cir. 1969); *Spinar and Germain v. United States*, 440 F. 2d 1241 (8 Cir. 1971).

The indiscriminate use of the "pandering" test not only deprives members of the public of access to constitutionally protected expression, but the test is also "hopelessly vague and incapable of objective administration". Emerson, *The System of Freedom of Expression* (1970) p. 490. The result is "that the pandering test adds an additional level of vagueness to the already vague complex of tests for obscenity and necessarily produces a far greater repressive effect". *Id.*

Similarly, the precise ruling in *Mishkin* has been extended far beyond its confines to endanger the exhibition and dissemination of expression clearly entitled to constitutional protection. In *Mishkin*, the Court emphasized that the material must be "designed for and primarily disseminated to a clearly defined deviant sexual group, rather than the public at large." (383 U.S. at 508). In *Redrup*, the Court stressed the requirement of a statute which "reflected a specific and limited state concern for juveniles". (386 U.S. at 769). See also, *Jacobellis v. Ohio*, 378 U.S. 184, 195. Since, "aside from the enforcement problems, which could be monumental, the variable approach requires an imposing number of determinations, some of them exceedingly subjective", (Magrath, *The Obscenity Cases: Grapes of Roth*, 1966, S. Ct. Rev. 7, 66-67), it is evident that the use of such vague standards as "pandering" and "variable obscenity" under a general obscenity statute, without specific prohibition, without

specific charge, and without any proof in support thereof, creates the very uncertainties, ambiguities and harassments which gravely undermine the exercise of freedoms of speech and press.

3. There is a further constitutional infirmity in the argument that a general obscenity statute may be used to punish the exhibition of a nonobscene and constitutionally protected motion picture film in a drive-in theater, merely because some hypothetical resident in a nearby dwelling or a passerby in a motor vehicle may deem a momentary viewing of a scene as "offensive" or an invasion of "privacy". Again, we are not dealing here with a specific "statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California [Washington] law, not be tolerated in certain places". *Cohen v. California,* 91 S. Ct. 1780, 1785. Nor do we deal here with any charge or proof of an actual assault upon the privacy of any individual. What the State is actually saying is that the exhibition of nonobscene constitutionally protected motion picture films in a drive-in theater to the general public may be suppressed at any time, on the arbitrary and capricious determination of a police officer, judge or jury, that some hypothetical resident in a nearby dwelling may be "offended".

We do not deal here with "any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it". *Redrup v. New York,* 386 U.S. at 769. This is not a case where the community by precise statutory provisions has affirmatively made known its view that it desires to avoid house-to-house canvassing to secure subscriptions, leav-

ing all other forms of solicitation available. *Breard v. Alexandria,* 341 U.S. 622. *Cf., Martin v. Struthers,* 319 U.S. 141. See also, *Rowan v. United States Post Office Department,* 397 U.S. 728. The issue does not involve a "captive audience" in any meaningful sense. See, *Public Utilities Commission v. Pollak,* 343 U.S. 451. What is really involved here is an attempt to so broaden the concept of obtrusive offensiveness as to prohibit and suppress any motion picture film shown in a drive-in theater which may be deemed subjectively objectionable to the most hypothetically prudish person in the community.

The Court has stated that "a function of free speech under our system of government is to invite dispute. It may indeed best serve its highest purpose when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects when it presses for acceptance of an idea". *Terminiello v. City of Chicago,* 337 U.S. 1, 4. In *Kingsley International Pictures Corp. v. Regents,* 360 U.S. 684, 688-689, the Court stated, "It is contended that the State's action was justified because the motion picture attractively portrays a relationship which is contrary to the moral standards, the religious precepts, and the legal code of its citizenry. This argument misconceives what it is that the Constitution protects. Its guarantee is not confined to the expression of ideas that are conventional or shared by a majority. It protects advocacy of the opinion that adultery may sometimes be proper, no less than advocacy of socialism or the single tax. And in the realm of ideas it protects expression which is eloquent no

less than that which is unconvincing. In *Red Lion Broadcasting Co., Inc. v. FCC*, 395 U.S. 367, 390, the Court stated, "it is the right of the public to receive suitable access to social, political, aesthetic, moral, and other ideas and experiences which is crucial here. That right may not constitutionally be abridged either by Congress or by the FCC".

In short, we do not deal here with a specific and precise statute, narrow in its prohibitions, intended solely to avoid invasion of substantial privacy interests in a plainly obtrusive manner. On the contrary, what is involved here is the use of a general obscenity statute intended to effect the censorship of all motion picture films exhibited in a drive-in theater under broad, vague and ambiguous standards, administered subjectively by governmental officials. The latter course is denied a State by the explicit provisions of the First and Fourteenth Amendments.

4. The Court has emphasized that a State cannot foreclose the exercise of constitutional rights by mere labels. *New York Times Co. v. Sullivan*, 376 U.S. 254, 269. The Court has constantly reiterated that commercial activity, in itself, is no justification for narrowing the protection of expression secured by the First Amendment. *Smith v. California*, 361 U.S. 147, 150; *New York Times Co. v. Sullivan*, 376 U.S. at 265-266. Such terms as "commercial exploitation", "pandering", and "offensiveness" should not be turned into "formulae for the repression of expression" nor receive "immunity from constitutional limitations". 376 U.S. at 269.

The Court has emphasized that statutes must be drawn with sufficient specificity so that persons seeking to exercise First Amendment rights, as well as those attempting to enforce the law, will know definitely

what is being prohibited. This doctrine of vagueness has been accompanied by the concomitant rule of overbreadth. The latter rule demands that the statute be framed to cover only that conduct which is constitutionally subject to control, and not embrace conduct under the First Amendment. Emerson, *The System of Freedom of Expression*, at 364-365.

> "The objectionable quality of vagueness and overbreadth does not depend upon absence of fair notice to a criminally accused or upon unchanneled delegation of legislative powers, but upon the danger of tolerating, in the area of First Amendment freedoms, the existence of a penal statute susceptible of sweeping and improper application. Cf. Marcus v. Search Warrant, 367 U.S. 717, 733, 81 S.Ct.1708, 1717, 6 L.Ed.2d 1127. These freedoms are delicate and vulnerable, as well as supremely precious in our society. The threat of sanctions may deter their exercise almost as potently as the actual application of sanctions. Cf. Smith v. California, supra, 361 U.S. at 151-154, 80 S.Ct. at 217-219; Speiser v. Randall, 357 U.S. 513, 526, 78 S.Ct. 1332, 1342, 2 L.Ed. 2d 1460. Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity."
>
> *NAACP v. Button*, 371 U.S. 415, 432-433.

The statute here, as construed and applied by the court below to the exhibition of a nonobscene motion picture film in a drive-in theater, in light of all the preceding discussion in this brief, has been rendered vague, ambiguous, uncertain and overbroad, and is, therefore, constitutionally infirm.

Conclusion.

For all of the foregoing reasons, the ruling and judgment of the court below should be reversed.

Respectfully submitted,

STANLEY FLEISHMAN,
SEYMOUR I. FEIG,
Attorneys for Amicus Curiae.

SAM ROSENWEIN,
Of Counsel.

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

LOUIS NIZER
Attorney for Motion Picture Association of America, Inc., Amicus Curiae
522 Fifth Avenue
New York, New York 10036

BARBARA SCOTT
JAMES BOURAS
of Counsel

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

The Motion Picture Association of America, Inc. hereby respectfully moves for leave to file as *amicus curiae* in this case the brief appended hereto. The consent of the attorneys for the Petitioner has been obtained. On November 9, 1971, movant wrote to the attorney for the Respondent. Copies of movant's letter and the reply thereto dated November 22, 1971, are appended to this Motion as Appendix A and Appendix B, respectively.

Motion Picture Association of America, Inc. ("MPAA") is a trade association whose membership comprises companies which are among the largest producers and distributors of motion pictures in the United States, to wit:

Allied Artists Pictures Corporation,
Avco Embassy Pictures Corp.,
Columbia Pictures Industries, Inc.,
Metro-Goldwyn-Mayer, Inc.,
Paramount Pictures Corporation,
Twentieth Century-Fox Film Corp.,
United Artists Corporation,
Universal Pictures, a division of Universal City Studios, Inc.,
Warner Bros., Inc.

At the present time there are approximately 14,450 commmercial motion picture theatres in the United States, of which about 3,810 (or 26% of the total) are so-called "drive-ins." A substantial proportion of the films exhibited by these drive-ins are produced and/or distributed by the companies which are members of MPAA. (However, the film involved in this case, "Carmen, Baby," was not produced and is not being distributed by a member of MPAA.)

Although the merits of the specific controversy involving exhibition of "Carmen, Baby" at the Park-Y Drive-In Theatre in Richland, Washington, will be briefed and argued by the parties, the Petition for Writ of Certiorari raises two additional questions of more general significance to the entire motion pictures industry. These are: (1) the constitutional means by and limits under which states may prohibit and punish the "obtrusive" presentation of non-obscene films, and (2) the constitutional permissibility of seizures of motion pictures which are not alleged to be obscene *per se*. Any decision by this Court on these questions will vitally affect the constitutional interests of MPAA's member companies, as well as all other producers, distributors and exhibitors of motion pictures in the United States.

Because MPAA believes that the general issues raised in this case are of vital concern to the entire motion picture industry, including its member companies, it respectfully requests permission to file the within brief *amicus curiae*.

Respectfully submitted,

LOUIS NIZER
Attorney for Motion Picture Association of America, Inc., Amicus Curiae

BARBARA SCOTT
JAMES BOURAS
of Counsel

APPENDIX A

(Letter of November 9, 1971)

MOTION PICTURE ASSOCIATION OF AMERICA, INC.
522 Fifth Avenue
New York, N. Y. 10036

November 9, 1971

AIR MAIL
The Hon. Herbert H. Davis
Prosecuting Attorney for
Benton County
P. O. Box 510
Prosser, Washington 99350

Re: *Rabe* v. *State of Washington*
(United States Supreme Court,
October Term, 1971, No. 71-247)

Dear Mr. Davis:

The Motion Picture Association of America is a trade association representing the major producers and distributors of motion pictures in the United States. Its members are:

Allied Artists Pictures Corp.
Avco Embassy Pictures Corp.
Columbia Pictures Industries, Inc.
Metro-Goldwyn-Mayer, Inc.
Paramount Pictures Corp.
Twentieth Century-Fox Film Corp.
United Artists Corp.
Universal Pictures, a division of Universal City Studios, Inc.
Warner Bros., Inc.

Because of the interest of the Association's members in the constitutional questions raised in *Rabe* v. *State of*

Appendix A

Washington, we would very much like to file a brief *amicus curiae* in support of the petitioner, William Rabe, in the action now pending in the Supreme Court (October Term, 1971, No. 71-247).

May we have your consent on behalf of the State of Washington to the filing by the Motion Picture Association of a brief *amicus curiae* in this case?

Thank you in advance for your consideration.

Very truly yours,

JAMES BOURAS

APPENDIX B

(Letter of November 22, 1971)

OFFICE OF THE
PROSECUTING ATTORNEY OF BENTON COUNTY
1112 Meade Ave., Prosser, Washington 99350

November 22, 1971

Reply to:
Curtis Ludwig
P. O. Box 6880
Kennewick, WA 99336

Mr. James Bouras
Motion Picture Association of America
522 Fifth Avenue
New York, New York 10036

Re: *Rabe* vs. *Washington*

Dear Mr. Bouras:

Your request for our consent to file an amicus curiae brief is one of several we have received.

Because of the other requests and our belief that the questions of law are being adequately presented by petitioner's counsel, we are unwilling to consent to any amicus curiae briefs.

Very truly yours,

HERBERT H. DAVIS
Prosecuting Attorney
Curtis Ludwig
CURTIS LUDWIG, Deputy
Prosecuting Attorney
Benton County, Washington

CL:ml

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

BRIEF OF MOTION PICTURE ASSOCIATION OF AMERICA, INC. AS *AMICUS CURIAE*

Interest of the *Amicus*

The interest of the *Amicus* is set forth in the Motion for Leave to file this brief, *supra.*

ARGUMENT

I.

An "obtrusive" presentation of a non-obscene motion picture may not constitutionally be punished as a crime in the absence of a statute making such presentation a crime and defining the elements thereof with particularity.

This Court has long held that the Constitution requires that "Every man should be able to know with certainty when he is committing a crime." *United States* v. *Reese et al.*, 92 U.S. 214, 220 (1875).

Yet Petitioner in this case was convicted of a crime which was nonexistent under the laws of the State of Washington at the time of his arrest—"obtrusive" exhibition[1] of a non-obscene motion picture which the justices of the Supreme Court of Washington found "*personally* distasteful, offensive and devoid of social, philosophical or artistic merit." *State* v. *Rabe*, 79 Wash.2d 254, 484 P.2d 917, 921 (1971) (emphasis added).[2]

In effect, what the Supreme Court of Washington has done in this case is engraft onto the State's general obscenity law a new, common law crime[3] whose scope is unde-

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[1] The majority opinion in the Supreme Court of Washington seems to imply that a mere *potential* for "an assault upon individual privacy" is sufficient to permit punishment, even in the absence of complaints. However, as Associate Justice Finley indicates in his concurring opinion (484 P.2d at 928), "the facts of the instant case do not, in my opinion, support the finding of an assault upon individual privacy. . . ." Cf. *Cohen* v. *California*, 403 U.S. 15, 21 (1971): ". . . the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." Also, some weight should be ascribed in cases of this type to whether or not unwilling persons can avoid anything more than momentary exposure to the material "simply by averting their eyes." *Ibid.*

[2] The majority held that the motion picture involved "probably would pass the definitional obscenity test" (484 P.2d at 922).

[3] This was done despite the canon that "This is a penal statute, and must be construed strictly. . . ." *United States* v. *Reese et al.*, 92 U.S. 214, 219 (1875).

Moreover, the Supreme Court of Washington's expansive construction of the State's general obscenity law is somewhat ironic in view of its observation (484 P.2d at 925) that the conviction could not be supported on the basis of exposure of children because the law did not at the time reflect a specific concern for children. It is difficult to see how it can be said that the same law impliedly reflects a specific concern for "obtrusive" presentations. Washington has

(Footnote continued on following page)

fined and about whose application in future cases drive-in theatre owners and operators in the State of Washington must guess at the risk of both a fine and a jail sentence.[4] If Petitioner's conviction is affirmed by this Court, the *in terrorem* effect of the Washington decision will spread across the nation.

To be sure, this Court has indicated that, in the case of certain material which approaches but does not meet the constitutional test of obscenity *per se*, states might legitimately concern themselves with "an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it." *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (per curiam). But it has never held that states may proceed in such cases in the absence of legislative action confined to material with, and means by, which states may constitutionally deal in this context.

Indeed, it is our belief that, if states may constitutionally proceed in so-called "public display" cases, they may do so only under specific statutes narrowly and precisely drawn to deal with the "evil" sought to be proscribed. Moreover, such statutes must keep in mind that "we are often 'captives' outside the sanctuary of the home," *Rowan* v. *Post Office Dept.*, 397 U.S. 728, 738 (1970), that different constitutional considerations apply when such proceedings affect the public at large rather than a single unwilling individual, *Organization for a Better Austin* v. *Keefe*, 402 U.S. 415, 420 (1971), and that in the

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since enacted a comprehensive legislative scheme for the protection of minors. R.C.W., Sections 9.68.050-120 (1971 Pocket Part).

In addition, the somewhat analogous crime of "indecent exposure" is at least defined by the State of Washington as a specific crime, although perhaps not with the requisite clarity. R.C.W., Sections 9.79.080, 9.79.120 (1961).

[4] R.C.W., Section 9.68.010 (1971 Pocket Part) defines obscenity as a "gross misdemeanor." R.C.W., Section 9.92.020 (1961) makes a gross misdemeanor punishable by up to a year in jail or a $1,000 fine, or both.

public context there must be "a showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen* v. *California*, 403 U.S. 15, 21 (1971). Furthermore, in the "public display" situation, statutes "obviously cannot leave the determination of what is offensive to the sole discretion of each person who may be confronted with such a display" since it "simultaneously reaches both consenting and unconsenting receipients." *The Report of the Commission on Obscenity and Pornography* 324, 365 (1970) (Legal Panel Report).[5]

The constitutional vices inherent in any approach other than that described in the preceding paragraph are amply demonstrated by the instant case.

First, "the State [of Washington] has punished [Petitioner] for conduct that was not criminal at the time [he] committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits. . . . There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language but also from an unforeseeable and retroactive judicial expansion of narraw and precise statutory language." *Bouie* v. *City of Columbia*, 378 U.S. 347, 350, 352 (1964).[6]

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[5] In what might loosely be termed a "private display" situation—*i.e.*, where governmental action affects only communication to a single unwilling individual—different constitutional considerations apply when the disseminator's function is ministerial only. *Rowan* v. *Post Office Dept.*, 397 U.S. 728 (1970). Even in this situation, however, the constitutional requirement of "fair warning" comes into play where an enactment calls for the disseminator to make judgments at his peril. *Pent-R-Books, Inc.* v. *United States Postal Service*, 328 F.Supp. 297 (E.D.N.Y. 1971).

[6] On a factual basis, this Court's decision in *Ginsburg* v. *United States*, 383 U.S. 463 (1966), does not support the Supreme Court of Washington's "contextual" construction of its State obscenity law. *Ginsburg* held merely that, in close cases, evidence of "pandering" is relevant in determining whether claimed "redeeming social value"

Both at the time of Petitioner's arrest and at the present time, Washington's general obscenity law, on its face, dealt only with material which was obscene *per se*.[7] Like the statute involved in *Cohen* v. *California, supra* at 19, the Washington law did not contain "any language . . . that would have put [Petitioner] on notice that certain kinds of otherwise permissible speech . . . would nevertheless . . . not be tolerated in certain places."

Second, the opinion of the Supreme Court of Washington contains a complete "lack of guidance to those who seek to adjust their conduct" to conform thereto. *Interstate Circuit* v. *Dallas*, 390 U.S. 676, 689 (1968). Indeed, the opinion is so vague and imprecise "that men of common intelligence must necessarily guess at its meaning and differ as to its application." *Connally* v. *General Constr. Co.*, 269 U.S. 385, 391 (1926). In the complete absence of "a sufficiently ascertainable standard of guilt," *Herndon* v. *Lowry*, 301 U.S. 242, 261 (1937), the decision and opinion are more than likely to induce the amount of self-censorship which this Court condemned in *Smith* v. *California*, 361 U.S. 147 (1959).

Third, the opinion provides no guidance to the police and prosecutors who must decide what, if any, prosecutions are to be commenced on the ground of "obtrusive"

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is feigned or real, even though the materials "cannot themselves be judged obscene in the abstract." *Id.* at 470, 474. In effect, the "pandering" found in *Ginzburg* impaired defendant's credibility in claiming "redeeming social value." *Ginsburg* involved an affirmative course of conduct on the part of defendant to deliberately "force public confrontration with the potentially offensive aspects of the work. . . ." *Id.* at 470. None of this is present in the instant case. Cf. *People* v. *Noroff*, 63 Cal.Rptr. 575, 433 P.2d 479, 480 (Sup.Ct. 1967), cert. denied, 390 U.S. 1012 (1968), refusing to admit evidence of "pandering" in an obscenity case on the ground, among another, that "the State Legislature has created no such crime."

[7] R.C.W., Section 9.68.010 (1961, 1971 Pocket Part).

presentation of non-obscene motion pictures. *Interstate Circuit* v. *Dallas, supra* at 689-690. In the absence of any guidelines, decisions to prosecute will be based, of necessity, on "personal predilections." *Cohen* v. *California, supra* at 21.

Fourth, other than their own "personal predilections," it is difficult to see what standards can be employed by judges and juries in the State of Washington in future cases of this type, or what standards can be employed by the justices of the Supreme Court of Washington in reviewing such cases. Indeed, in affirming Petitioner's conviction, the Supreme Court of Washington said only that it found the film "*personally* distasteful, offensive . . ." *State* v. *Rabe, supra,* 484 P.2d at 921 (emphasis added). The opportunity for effective judicial review is therefore completely foreclosed. *Interstate Circuit* v. *Dallas, supra* at 690.

As noted in the Motion for Leave to file this brief, *supra,* there are at the present time approximately 14,450 commercial motion picture theatres in the United States, of which about 3,810 (or 26% of the total) are drive-ins. This Court's decision in the instant case therefore will have a profound impact on the future course of motion picture production, distribution and exhibition in the United States. Indeed, the "chilling effect" inherent in any approach other than that which we have described above (see text, pages 3-4, *supra*) is demonstrated not only by the instant case, but also by some of the approaches considered by other courts in other cases involving allegedly "obtrusive" presentations. These cases are outlined and discussed in the numbered paragraphs below.

1. *Injunction Cases.* The instant case is the only one in which a criminal penalty has been imposed absent specific statutory authorization therefor, but there are two cases in which injunctions have issued absent specific authorization. *Bloss* v. *Paris Township,* 380 Mich. 466,

157 N.W.2d 260 (1968); *Cactus Corporation* v. *State ex rel. Murphy*, 14 Ariz.App. 38, 480 P.2d 375 (1971).[8]

Bloss involved denial of license renewal and the issuance of an injunction prohibiting operation of plaintiff's drive-in theatre in any manner. This approach is clearly invalid on the ground, among others, that it prevents all future exhibitions of motion pictures of any kind. *Near* v. *Minnesota*, 283 U.S. 697 (1931); *Organization for a Better Austin* v. *Keefe*, *supra* at 418-419.[9]

Cactus involved issuance of an injunction against exhibition of a specific motion picture "or any other motion picture film of the same character." This approach is clearly invalid on the ground, among others, that the vagueness of the injunction imposes an impossible burden on those who must conform their conduct therewith upon penalty of contempt. *Rowan* v. *Post Office Dept.*, *supra* at 735, 737; *New Riviera Arts Theatre* v. *State*, 412 S.W.2d 890 (Tenn.Sup.Ct. 1967); *Robert Arthur Management*

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[8] Issuance of the injunction in each case was predicated on a finding that the "obtrusive" manner of presentation constituted a "public nuisance." Cf. *Grove Press, Inc.* v. *City of Philadelphia*, 418 F.2d 82, 88 (3d Cir. 1969): "The common law of public nuisance may be a perfectly valid method by which to implement a state's police power in certain defined circumstances where, for example, it is used to restrain that which is prohibited by other constitutionally appropriate standards. It may not be used, however, both to define the standards of protected speech and to serve as the vehicle for its restraint."

[9] By the same token, license revocation is a constitutionally impermissible sanction in the First Amendment area. See, *e.g.*, *Van Curler Broadcasting Corp.* v. *Musto, et al.* (U.S.D.C., D.N.J., Civil Action No. 431-68) (opinion of Augelli, J., dated June 4, 1968) (not officially reported): "The ordinance, as presently written, permits revocation of an annual license to operate a theatre, for the showing of a single film found by the Board to be 'lewd, obscene or indecent.' The revocation is final, and such step is taken without regard to a licensee's right to exhibit, during the remaining life of the license, motion pictures that are not obscene." See also: *Oregon Bookmark Corporation* v. *Schrunk*, 321 F.Supp. 639, 642 (D.Ore. 1970).

Corp. v. *State*, 414 S.W.2d 638 (Tenn.Sup.Ct. 1967), rev'd on other grounds, 389 U.S. 578 (1968) (per curiam).[10]

2. *"Fence" Legislation.* Two cases involved ordinances compelling construction of fences to concel images on drive-in screens from persons outside the theatre. In our opinion, such legislation raises grave constitutional problems.

In *Olympic Drive-In Theatre, Inc.* v. *City of Pagedale*, 441 S.W.2d 5 (Mo.Sup.Ct. 1969), one such ordinance was held invalid on the ground, among others, of what in effect amounted to overbreadth—namely, "it requires the drive-in theatre operator to locate his screen or erect fences so that the movies cannot be seen from the streets or highways *no matter what kind of picture is being shown.*" *Id.* at 10 (emphasis added).[11]

In *Cinecom Theatres Midwest States, Inc.* v. *The City of Fort Wayne, et al.*,[12] both a temporary restraining order and a preliminary injunction were issued against enforcement of a similar ordinance.

3. *Enactments Dealing Specifically With "Obtrusive" Presentations.* Two cases, *State* v. *Furio*, 267 N.C. 353,

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[10] Cf. *Close* v. *Lederle*, 424 F.2d 988 (1st Cir. 1970), cert. denied, 400 U.S. 903 (1970), involving a mere order to desist with no penalty involved. Also involved in the *Close* case, *sub silentio*, were such issues as an employer-employee relationship, the propriety of issuing a mandatory injunction, etc.

[11] The decision also found void for vagueness another ordinance permitting license revocation. See footnote 9, *supra*.

[12] State of Indiana, County of Allen, Allen Superior Court No. 3, Cause No. 16620 (not officially reported). The temporary restraining order was entered on August 14, 1970, by Judge Robert L. Thompson, Jr., and the preliminary injunction was entered on September 8, 1970, by Judge David B. Keller. We have no information on further proceedings, if any, in this case.

148 S.E.2d 275 (1966),[13] and *State of Nebraska* v. *Blank*,[14] involved ordinances specifically prohibiting "obtrusive" presentations of motion pictures, both of which were found void for vagueness.

Chemline, Inc. v. *City of Grand Prairie*, 364 F.2d 721 (5th Cir. 1966), upheld in principal the validity of a similar ordinance but did not consider the question of vagueness.[15]

People v. *Lou Bern Broadway, Inc.* (Criminal Court, County of New York, November 9, 1971)[16] upheld the con-

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[13] The ordinance involved read as follows: "It shall be unlawful for any person, firm or corporation to construct or maintain along any street or highway, in such a manner as to be visible to the general public using such street or highway, any sign, billboard, motion picture screen or other structure upon which is printed, painted, projected or displayed any nude, or semi-nude pictures or any pictures or words which are vulgar, indecent or offensive to the public morals."

[14] Municipal Court of the City of Omaha, Douglas County, Nebraska, Docket No. C7 (not officially reported). The ordinance involved read as follows: "It shall be unlawful for any owner or operator of an outdoor theater to show or cause to be shown a motion picture depicting any person, whether nude or clad, in an act of sexual intercourse or unnatural copulation where the viewing portion of the screen of such theater is situated within the view of any residence or public street or highway where children under eighteen (18) have an understanding view of the picture." On February 2, 1971, Judge D.B. Anderson granted defendant's motion to dismiss on the ground, among others, that the ordinance was void for vagueness.

[15] In relevant part, the ordinance involved prohibited the exhibition of "any motion picture . . . which is visible from any public street or highway in which the bare buttocks or the bare female breasts of the human body are shown or in which striptease, burlesque or nudist-type scenes constitute the main or primary material of the movie. . . ."

[16] Not yet officially reported. The opinion is reprinted in *New York Law Journal*, November 10, 1971, page 17, column 8; page 18, columns 1-3.

stitutionality of New York State's recently enacted "public display" legislation.[17]

See also: *Vista Theatre Corporation* v. *City of Fort Worth,* 322 F.Supp. 1147 (N.D.Tex. 1971).[18]

Again, we recognize that this Court, other courts and various legislative bodies have manifested a concern about preventing the exposure of certain kinds of non-obscene material to unwilling persons. However, we believe that, if there is to be "an adjustment between the rights of the disseminator and the nonconsenting viewer," *State* v. *Rabe, supra,* 484 P.2d at 924, it must be consistent with the First Amendment. Certainly, both the approach and opinion of the Supreme Court of Washington fall far short of recognizing, let alone protecting, First Amendment rights.

In short, it is our position that states may proceed in cases such as this only under specific statutes narrowly and precisely drawn to deal with the "evil" sought to, and which may constitutionally, be proscribed.[19] Accordingly, since the State of Washington "has not as yet provided by 'appropriate legislation' for the punishment of the offence charged," *United States* v. *Reese et al., supra* at 221, Petitioner's conviction must be reversed.

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[17] New York Penal Law, Sections 245.10-11 (effective September 1, 1971).

[18] This case involved, but did not pass on the constitutionality of, an ordinance which read as follows: "It shall be unlawful for the owner, manager, operator, assistant manager, assistant operator, ticket seller, ticket taker, usher and/or any other person connected with or employed by any motion picture theater or drive-in motion picture theater in the City of Fort Worth or to aid or assist in such showing or exhibition of any motion picture, film, slide or other exhibit which is visible from any public street or highway in which the public area, bare buttocks or bare female breasts of the human body are shown."

[19] In the text of this brief we have addressed ourselves only to the issue of "public display." See footnote 5, *supra.*

II.

Seizure of a motion picture which is not alleged be obscene *per se* is constitutionally impermissible.

Petitioner has argued that seizure of a motion picture constitutionally impermissible unless there has been a or "adversary hearing."

We agree that this should be the constitutional requirent when a motion picture is alleged to be obscene *per se*. wever, we believe the First Amendment compels a more ngent constitutional requirement when a motion picture ot alleged to be obscene *per se*:[20] absent extraordinary cumstances,[21] *any* seizure is constitutionally impermisle in such a case.

As this Court recognized in *Speiser* v. *Randall*, 357 S. 513, 520, 525 (1958), "When we deal with the complex strands in the web of freedom which make up free ech, the operation and effect of the method by which ech is sought to be restrained must be subjected to se analysis and critical judgment in the light of the rticular circumstances to which it is applied. . . . The aration of legitimate from illegitimate speech calls for sensitive tools. . . ."

Seizure is hardly a "sensitive tool" when a motion ture is not alleged to be obscene *per se*. It's more like lunderbuss.

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[20] This would include cases involving alleged unlawful exhibition ninors, alleged "obtrusive" presentation, and/or alleged "pander-" See *Redrup* v. *New York*, 386 U.S. 767, 769 (1967) (per iam).

We recognize, of course, that states may seek to evade the con-utional requirement we are suggesting by making specious allega-s of obscenity *per se* as well. However, the availability of alter-ives (see text, *infra*) may reduce any incentive to so allege.

[21] We do not consider here what might constitute such "extraor-ary circumstances."

It has been recognized that a single print of a motion picture may reach many thousands of viewers,[22] and that seizure thereof has the same suppressive effect as the seizure of "massive" quantities of books. See, *e.g.*, *Bethview Amusement Corp.* v. *Cahn*, 416 F.2d 410, 412 (2d Cir. 1969), cert. denied, 397 U.S. 920 (1970); *Astro Cinema Corp. Inc.* v. *Mackell*, 422 F.2d 293, 295-296 (2d Cir. 1970); *United States* v. *Thevis*, 328 F.Supp. 135, 136 (E.D.La. 1971).

In a case where a motion picture is not alleged to be obscene *per se*, seizure is "not reasonably restricted to the evil with which it is said to deal." *Butler* v. *Michigan*, 352 U.S. 380, 383 (1957). Instead, even though the complaint is directed only to a specific use of the motion picture, seizure prevents *all* uses of that motion picture, even those which the state would concede to be valid.

In *Ginzburg* v. *United States*, 383 U.S. 463, 475 (1966), this Court was careful to note that its decision "does not necessarily suppress the materials in question, nor chill their proper distribution for a proper use." See also: *Memoirs* v. *Massachusetts*, 383 U.S. 413, 420-421 (1966). In the instant case, by contrast, seizure and detention of "Carmen, Baby" made impossible even what the Supreme Court of Washington would concede to be a "proper" exhibition—*e.g.*, to an audience of adults in an enclosed, "four wall" theatre.[23]

We recognize that, in a case such as this, the state may have a legitimate interest in securing *temporary* use of a print for the preparation and in the presentation of its

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[22] Both in the theatre at which it is currently being exhibited and in theatres at which it is subsequently exhibited. In addition, it should be recognized that prints of a motion picture are quite expensive and are available in limited supply.

[23] We recognize that the initial allegation was one of obscenity *per se*. But see footnote 20, *supra*.

case.[24]. But seizure, which suppresses exhibition of a print through termination of the trial stage and possibly through the appellate stage, is not a constitutionally permissible means by which the state can secure such temporary use. Like the typically "overbroad" statute, seizure in such a case sweeps within its ambit constitutionally protected as well as unprotected uses of the motion picture in question.

As noted in *NAACP* v. *Alabama*, 377 U.S. 288, 307 (1964), "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms." See also: *Freedman* v. *Maryland*, 380 U.S. 51 (1965); *A Quantity of Books* v. *Kansas*, 378 U.S. 205 (1964); *Marcus* v. *Search Warrant*, 367 U.S. 717 (1961).

Indeed, ". . . even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of . . . arbidgement must be viewed in the light of less drastic means for achieving the same basic purpose." *Shelton* v. *Tucker*, 364 U.S. 479, 488 (1960).

We do not mean to suggest here what procedures, short of seizure and detention, states may constitutionally follow in a case such as this to properly prepare and present their contentions. We note, however, that the numerous lower court opinions in this area are not without suggestions for alternatives. See, e.g., *Tyrone, Inc.* v. *Wilkinson*, 410 F.2d 639, 644 (4th Cir. 1969), cert. denied, 396 U.S. 985 (1969); *Metzger* v. *Pearcy*, 393 F.2d 202, 204 (7th Cir. 1968); *United States* v. *Alexander*, 428 F.2d 1169, 1176

[24] Query: is the entire film relevant in a case, for example, in which a single complaint is received from a single individual about his unwilling exposure to a single scene?

(8th Cir. 1970); *Bethview Amusement Corp.* v. *Cahn, supra.* To be sure, some burden on constitutionally protected uses of the motion picture in question will be imposed in any case, but the alternatives suggested in these cases are certainly far less onerous than seizure and detention. The state may, "using some or any of the alternatives suggested . . ., succeed in reconciling the interest in securing evidence . . . with the First Amendment principle of avoiding substantial restraints on speech. . . ." *Astro Cinema Corp. Inc.* v. *Mackell, supra.*

All we argue here, however, is that seizure of a motion picture is constitutionally impermissible in a case where that motion picture is not alleged to be obscene *per se.* In our judgment, seizure in such a case ". . . is to burn the house to roast the pig." *Butler* v. *Michigan, supra.*

CONCLUSION

It is respectfully submitted that the judgment under review in the instant case should be reversed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF PETITIONER

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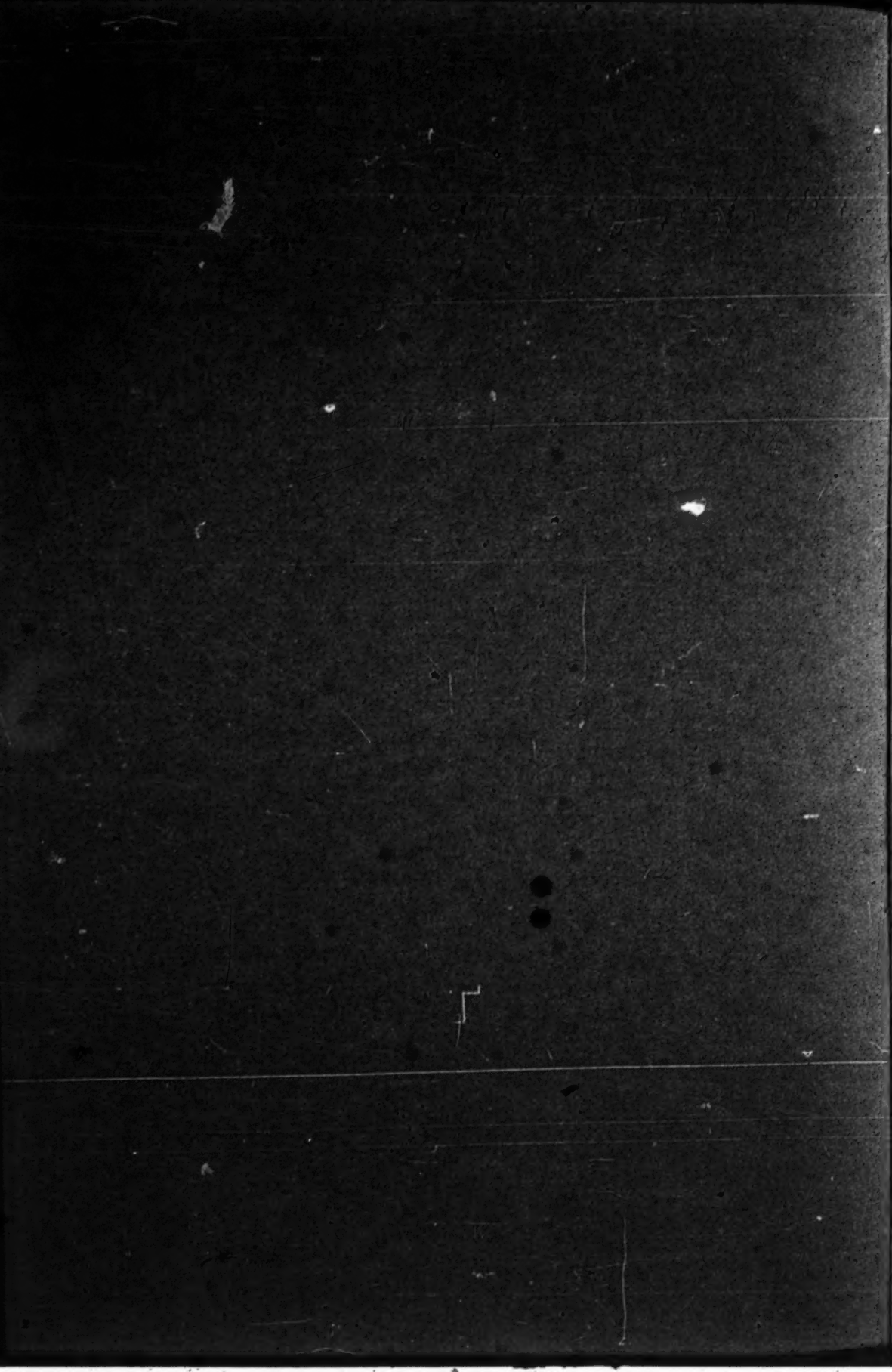

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF PETITIONER

Petitioner, William Rabe, prays that, upon review and hearing, the judgment entered herein by the Supreme Court of the State of Washington on May 6, 1971, be reversed.

OPINIONS BELOW

The following opinions and decisions of the courts of the State of Washington are set forth in the Joint Appendix hereto:

1. Order Denying Motion to Suppress, Justice Court, Richland Precinct, September 27, 1968 (A. 12).

2. Decision, Justice Court, Richland Precinct, October 7, 1968 (A. 16).

3. Findings of Fact, Conclusions of Law, and Judgment, Superior Court of the State of Washington for Benton County, September 22, 1969 (A. 71, 73).

4. Opinion of the Supreme Court of the State of Washington, reported at Volume 79, Washington Reports 2nd, page 254, 484 P.2d 917, May 6, 1971, (A. 79).

JURISDICTION

The judgment of the Supreme Court of the State of Washington following appeal from petitioner's conviction was entered on May 6, 1971. On July 28, 1971, this Court entered an order extending the time within which to petition for certiorari to and including August 18, 1971. The petition for a writ of certiorari was filed on August 18, 1971, and was granted on October 26, 1971. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment XIV, § 1:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Laws of the State of Washington, 1961, Ch. 146, § 1, codified as § 9.68.010, page 153, Title A, Revised Code of Washington Annotated:

9.68.010 *Obscene literature, shows, etc.* Every person who—

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

QUESTIONS PRESENTED

The questions presented for review, as set forth in the petition for certiorari, are as follows:

1. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner, the manager of a drive-in theatre, of criminal violation of a general obscenity statute for exhibiting "Carmen Baby," a motion picture which is not obscene under the standards established by this Court, on the rationale that the picture contains erotic scenes which might be viewed unwittingly and out of context by persons having a view of the screen from nearby houses or passing automobiles.

2. Whether the State of Washington, consistent with the First and Fourteenth Amendments, may convict petitioner of a crime for showing a non-obscene motion picture containing allegedly offensive scenes on a drive-in screen visible from nearby houses and roads, on the rationale of protecting privacy, where the statute relied upon pro-

hibited only the dissemination of obscene materials, the state had not enacted a statute of the "offensive display" type or any other law giving petitioner notice of the conduct sought to be punished, no one had complained about the film, and there was no evidence that anyone in nearby houses or passing cars had in fact seen it on the screen.

3. Whether the First and Fourteenth Amendments permit the seizure of a motion picture, incident to an exhibitor's arrest on an obscenity charge, where the arrest warrant was issued solely on the testimony of a police officer who had seen most but not all of the film from a distance without hearing any of the sound track, the testimony described individual scenes in the picture, nothing was received in evidence on the film's dialogue or plot, and the magistrate held no adversary hearing on the question of alleged obscenity.

STATEMENT OF THE CASE

1. The Motion Picture Involved

This case arises from petitioner's criminal conviction following the showing of a motion picture entitled "Carmen Baby" at a drive-in theatre of which he was manager.

The film is a dramatic story based upon the libretto of Bizet's opera "Carmen," which in turn was based upon a novel by Merimee (Tr. 111, 132). It tells of an upright police officer who is corrupted and ultimately destroyed by his passion for a prostitute (Tr. 89, 93, 104, 119). The film contains erotic scenes, but sexual consummation is suggested rather than shown (Tr. 88, 122), and the scenes are an integral part of the story and the theme of moral decline and fall (Tr. 89, 108, 115, 120).

Prior to the events here in question, "Carmen Baby"

was reviewed in the *New York Times* and was exhibited in various parts of the United States (Tr. 133-34, 76, 84). One witness had seen it playing at Oak Ridge, Tennessee, on an outdoor screen visible from a motel which had arranged to have the sound track of the motion picture piped into the rooms for those who wished to watch it (Tr. 84). In two states, Rhode Island and New Jersey, "Carmen Baby" had been tested in the courts and found to be non-obscene and protected under the free speech guaranty of the First and Fourteenth Amendments. Transcripts of these two unreported state trial court decisions[1] were filed by petitioner in the Superior Court below, and are reproduced in the Joint Appendix hereto (A. 33, 37). In one of them, Judge Matthews of the New Jersey court gave a concise and engaging summary of the film's contents (A. 51-60), concluding:

> "We have imposed upon us by the Supreme Court of the United States a standard to judge obscenity. I don't have too much difficulty with it. . . .
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> • • •
>
> "When I look at this film and I look at this test, whether the elements coalesce or not, it seems to me, one, that the dominant theme of this movie taken as a whole is not to a person of average intelligence merely one to appeal to the prurient interest of the members of society. It can. But there are individuals who can get awfully excited at a pencil. There are people who collect shoes, because they get sexual satisfaction from it.
>
> "What we are talking about is the 'normal' member of society.
>
> "Secondly, is the material patently offensive because it affronts contemporary community standards relating

1. *Scuncio v. Columbus Theatre, Inc.*, C.A. 67-4565, R.I. Superior Ct.; *Van Curler Broadcasting Corp. v. Musto*, Superior Ct. of N.J., Hudson County.

to the description or representation of sexual matters? I am sure that no one would go to that picture or no one will learn anything new. There is nothing in that picture that actually portrays the sexual act. You must infer it. The only genitals that are seen are those of a male, and they're on a statue, and you can see those in the Vatican, Judge Drewen.

"And the third test is whether it's utterly without redeeming social value. My reaction to the picture was the utter horror that an individual, a human being, a creature, could have sunk to such baseness without the suggestion that there was something wrong mentally; *and, of course, this was a work of art. It wasn't life. And while it tried to portray life, the way this artist saw life, was through this woman, in this kind of a situation.*

"The picture is not obscene, within the legal sense. . . ." (A. 57-59; emphasis added)

In the State of Washington, the motion picture was exhibited in Seattle, and in a three-week engagement at a drive-in theatre in Yakima (Tr. 76). It was then booked into the Park Y Drive-in Theatre at Richland, another town in Eastern Washington (Tr. 76). Petitioner was the manager of the latter theatre (Tr. 74).

2. Justice Court Proceedings

"Carmen Baby" opened at the theatre in Richland on August 25, 1968. On August 30, 1968, a sergeant of the Richland Police Department signed a criminal complaint and appeared before a justice of the peace seeking a "John Doe warrant" to arrest either the manager or projectionist (A. 8). The police sergeant testified that he had seen most of the film on the nights of August 28 and 29, and described two scenes, one which he characterized as "lewd" and another which he described in answer to the magistrate's inquiry as to whether there were "other scenes

of unnatural emotions" (A. 9). He gave no testimony as to the film's thematic content. Indeed, he could not do so, since he had never heard the sound track but only watched the picture from a distance (Tr. 17, 18-19).

The magistrate conducted no adversary hearing and received no other evidence. On the basis of the police sergeant's testimony, he issued a warrant for the arrest of "John Doe" (A. 10). The police then went to the theatre, seized the film, and arrested petitioner (Tr. 15-16).

A trial was held in Justice Court on the charge that petitioner had violated RCW 9.68.010, the Washington obscenity statute. Before trial, petitioner moved to suppress the film as evidence on the ground that it had been seized in violation of the First and Fourteenth Amendments (A. 11). The justice of the peace denied this motion, rendering a written decision (A. 12). Following trial, the justice of the peace found petitioner guilty on October 7, 1968, and sentenced him to pay a fine (A. 16).

3. Superior Court Proceedings

Petitioner appealed his Justice Court conviction to the Superior Court for Benton County, the state court of general trial jurisdiction (A. 29). In that court he renewed his motion to suppress, which was again denied (A. 30, 31).

In Superior Court the case was tried *de novo* commencing April 2, 1969, to the judge sitting without a jury. The prosecution called six witnesses who rendered opinions on the quality of the film, as follows:

(a) A speech and drama instructor at Columbia Basin College testified that in his opinion the dominant theme of the picture was an appeal to prurient interest, and that

it had no redeeming social value, but conceded that he could not say whether it offended contemporary community standards in its portrayal of sex (Tr. 30, 35, 36).

(b) The local vice president of Atlantic-Richfield Company—who, like the other non-experts called by the state, answered opinion questions couched in conclusory language by the prosecutor—testified that in his opinion the predominant theme of the film was an appeal to prurient interest, that it was patently offensive in affronting contemporary community standards, and that it had no redeeming social value (Tr. 39-41). Cross-examination revealed that in the preceding two years he had seen only three motion pictures—a Billy Graham film, "The Sound of Music," and "Doctor Zhivago"—and that he had avoided "The Graduate" because in his opinion "it is not good for me, and I guess, therefore, others, to see things like this" (Tr. 42-43).

(c) An insurance agent gave the same conclusory answers to the prosecutor on the three-part obscenity test (Tr. 44-45). But on cross-examination he was unable to give any definition for the word "prurient" (Tr. 46), and testified that he based his definition of community standards "on my own moral standards more than anything" (Tr. 46).

(d) The manager of a foods processing plant, a member of the school board, gave the same set of conclusory answers on the obscenity elements (Tr. 49-50). Cross-examination brought out that he was simply equating his personal moral feelings with community standards, and had testified in terms of the former (Tr. 50-51, 53).

(e) A farmer gave the same set of conclusory answers, but admitted that he was not familiar with current motion

pictures, having only seen two in the past five years, and was testifying on the basis of his "personal feeling" (Tr. 56-58).

(f) A psychologist expressed similar conclusions in applying the three-part test for obscenity, although his answer as to community standards was largely unresponsive (Tr. 62-63). He added an opinion that "nudity was underplayed" in the film, which might result in an appeal to "latent homosexuality" (Tr. 63-4). This witness thought that *all* motion pictures are a damaging influence and had seen none in the last five years except some westerns and a James Bond movie (Tr. 66, 69).

Six witnesses testified on petitioner's behalf that the predominant theme of the film was a dramatic story with a moral message (variously interpreted), that it did not offend contemporary community standards, and that it possessed redeeming social value:

(a) A radiological engineer, formerly a professional photographer, chairman of the local Children's Home Society, described other films of equal candor being shown routinely in the vicinity, and praised the photography and theme of "Carmen Baby" (Tr. 84-97).

(b) A woman administrative assistant at the Atomic Energy Commission, chairman of the Library Board for the City of Richland, testified that the picture's theme was "[t]he degradation or almost annihilation of a personality as a result of his obsession for a woman," and that the erotic scenes were necessary to the story (Tr. 103-8).

(c) A mother of four children with a degree in English literature found the "characters interesting" and the opening scene "a beautiful thing" (Tr. 110-115).

(d) A Ph.D in physics saw the film as "a classic tragedy on the Greek model" (Tr. 117-122).

(e) A systems analyst, who sees 75 to 100 motion pictures per year, described this one as "artistic in nature" and as telling "a story that has some value . . ." (Tr. 124-129).

(f) The chairman of the language arts department at Columbia Basin College listed parallels between the film and the opera "Carmen" (Tr. 131-138).

The police sergeant who had signed the criminal complaint testified that the drive-in theatre screen was visible from a nearby highway, and that on both nights that he sat outside the theatre in his car he had seen teenagers and younger children watching the film through a wire fence which surrounded most of the premises (Tr. 17, 20-21).

Petitioner testified that as theatre manager he had been occupied running the concession stand and the ticket office every night, and had never seen the film at the time of his arrest, although he had heard comments about it (Tr. 74-82). This testimony was uncontradicted.

At the close of the evidence and following argument the Superior Court judge rendered an oral opinion stating, in effect, that he would find petitioner guilty without finding the film to be obscene in the constitutional sense. He stated:

> "The point I am making is that I don't believe that it is necessary for this court to reach the issue of whether the picture taken as a whole is obscene. I think this court under these peculiar circumstances must consider each portion of the picture as viewed by, I suppose, all of the families in the residential area, all of the people driving over the overpass, as

short scenes, individual portions of the movie, and in looking at it on that basis I agree with Justice Bowman.

"Who can say that this is not obscene? In that light there is no plot, nothing. Just an offensive demonstration displayed to families passing in the night." (A. 68-69).

On April 24, 1969, the judge allowed the prosecution, over petitioner's objection, to reopen to present the testimony of an additional police officer (Tr. 151-53, 155). The officer testified that approximately twelve to fifteen residences in the area have a view of the screen at the drive-in theatre (Tr. 163).

Six months later, on September 22, 1969, the Superior Court entered its written findings and conclusions, including most significantly Conclusion of Law II:

"Individual portions or scenes of the movie 'Carmen Baby' are obscene and to passing motorists or persons and residents outside the theatre those individual scenes become a movie by themselves." (A. 71-72).

The court made no findings as to whether petitioner had known the contents of the film, or whether the film as a whole was obscene within the meaning of that term as defined by this Court (A. 71-72). A judgment of "guilty of the crime of obscenity" was entered, and petitioner was sentenced to pay a fine of six hundred dollars (A. 73).

4. State Supreme Court Proceedings

Petitioner appealed his conviction to the Supreme Court of the State of Washington, which received briefs and heard argument *en banc*. On May 6, 1971, the court filed its opinion affirming the conviction (A. 79-103). Rejecting petitioner's arguments both on the seizure point and on the merits, the court held that the film "probably would

pass the definitional obscenity test" of *Roth v. United States*, 354 U.S. 476 (1957), but that the "context of its exhibition" made it obscene in this instance (A. 90). While apparently conceding that neither the presence of juveniles outside the fence nor the possible glimpses by passing motorists could support a conviction, the majority concluded that the exhibition of "lewd and offensive films" visible from houses would violate the residents' "individual privacy" contrary to RCW 9.68.010, the obscenity statute (A. 96).

The sentence imposed upon petitioner has not yet been executed.

SUMMARY OF ARGUMENT

1. The film here at issue is non-obscene and constitutionally protected. In wielding its obscenity statute to punish the dissemination of a protected work, the Washington court has misread this Court's decision in *Redrup v. New York*, 386 U.S. 767 (1967). Even if a state may regulate the content of public displays visible to unwilling passers-by, it may do so only by enacting a specific statute clearly defining the proscribed conduct. The opinion below erroneously rejects the definition of obscenity established in *Roth v. United States*, 354 U.S. 476 (1957), while imposing criminal penalties on the vague ground that isolated portions of the film are considered "offensive." Petitioner's conviction subjects protected speech to overbroad and unpredictable restraints, contrary to the First and Fourteenth Amendments.

2. Washington had not adopted any statute dealing with allegedly obtrusive displays, nor had its courts even recognized a common law right of privacy. Nothing in the

statute or elsewhere gave petitioner notice that he could be prosecuted for exhibiting a non-obscene film on an outdoor screen visible from afar. His conviction under an unforseeable, *ex post facto* judicial expansion of the precise language of the obscenity statute deprives him of due process of law. *Bouie v. Columbia*, 378 U.S. 347 (1964). Moreover, the State offered no proof that any substantial invasion of privacy had in fact occurred. See *Redrup, supra*, 386 U.S. at 769; *Cohen v. California*, 403 U.S. 15 (1971). There was thus no proof that petitioner committed any offense, even had there been a statute defining one.

3. The State's seizure of the motion picture film, without a prior adversary hearing on the question of alleged obscenity, violated the First and Fourteenth Amendments. In issuing an arrest warrant on the sole basis of testimony by a police officer who had seen less than all of the film, and heard none of the sound, the magistrate failed to conduct the searching inquiry required by *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961). Only a pre-seizure adversary hearing can provide the necessary safeguards against extended de facto censorship by seizure incident to criminal prosecution.

ARGUMENT

I. THE STATE'S USE OF A GENERAL OBSCENITY STATUTE TO PUNISH PETITIONER CRIMINALLY FOR HAVING EXHIBITED A NON-OBSCENE MOTION PICTURE, ON THE RATIONALE THAT INDIVIDUAL SCENES IN THE FILM MIGHT OFFEND OR INVADE THE PRIVACY OF PERSONS IN NEARBY HOUSES, SUBJECTS PROTECTED SPEECH TO OVERBROAD, VAGUE, AND UNPREDICTABLE RESTRAINTS, CONTRARY TO THE FIRST AND FOURTEENTH AMENDMENTS.

While the Washington Supreme Court has conceded only that "Carmen Baby" "probably" would pass the definitional obscenity test, the record makes unmistakably clear that it would. The six witnesses to the film's contents called by petitioner in the trial court—a representative group of citizens experienced in films and literature—explained in convincing terms why they found it meritorious (Tr. 84-138). The State offered no substantial evidence that the material offended national standards, as opposed to personal tastes.[2] The film has a predominant dramatic theme, possesses genuine social value, and is well within the prevailing community standards of candor. Thus it is constitutionally protected under the standards carefully developed in *Roth v. United States*, 354 U.S. 476 (1957), *A Book v. Attorney General of Massachusetts*, 383 U.S. 413 (1966), and other cases.[3]

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2. The prosecution must prove that the material violates *national* standards of obscenity. *Jacobellis v. Ohio*, 378 U.S. 184, 195 (1964).

3. It is manifest that "Carmen Baby" is superior to much other material within the broad scope of First Amendment protection. See, e.g., the holdings in *Burgin v. South Carolina*, No. 70-122, 40 U.S. L. Week 3160 (October 12, 1971) (four magazines); *Ratner v. California*, 388 U.S. 442 (1967) (per curiam) ("Honey Bee"); *Cobert v. New York*, 388 U.S. 443 (1967) (per curiam) (various films); *Schackman v. California*, 388 U.S. 454 (1967) (per curiam) (various films); *I.M. Amusement Corp. v. Ohio*, 389 U.S. 573 (1968) (per curiam) ("Artist's

It is axiomatic that attempts to punish non-obscene materials under general obscenity statutes are unconstitutional under the freedom of speech guaranty of the First and Fourteenth Amendments. *E.g., Jacobellis v. Ohio,* 378 U.S. 184 (1964). Here, Washington attempts to escape that principle on the rationale that the film was exhibited in a fashion which invaded privacy. In doing so it relies upon this Court's *per curiam* opinion in *Redrup v. New York,* 386 U.S. 767 (1967), where the Court observed in reversing three convictions:

> "In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Massachusetts, 321 U.S. 158; cf. Butler v. Michigan, 352 U.S. 380. In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it. Cf. Breard v. Alexandria, 341 U.S. 622; Public Utilities Comm'n v. Pollak, 343 U.S. 451. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463." *Id.,* 386 U.S. at 769.

The Washington court has construed the foregoing language to mean that an *obscenity* statute—not a privacy-protection statute—can be wielded to punish the exhibition of non-obscene materials where supposed privacy interests are at stake. Such an application of the law would seriously inhibit expression and invest prosecuting authori-

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Models"); *Robert-Arthur Management Corp. v. Tennessee,* 389 U.S. 578 (1968) (per curiam) ("Mondo Freudo" and trailer for "Olga's Girls"); *Cain v. Kentucky,* 397 U.S. 319 (1970) (per curiam) ("I, a Woman"); *Bloss v. Michigan,* 29 L.Ed.2d 106 (May 3, 1971) ("A Woman's Urge").

ties with unbridled discretion to punish speech.

Even if a State may regulate the content of public displays visible to an unwilling audience of passersby, surely it may do so only by the enactment of a specific statute carefully drawn to deal with the matter sought to be proscribed. It has long been the rule that First Amendment rights may not be restricted by a statute, general and indefinite in its terms, which leaves a wide area of discretion to enforcement authorities. *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968). In those cases where this Court has sanctioned limitations upon First Amendment rights on the basis of asserted invasions of privacy, it has done so only in the context of approving narrowly drawn statutes or ordinances designed to protect the asserted privacy interests while clearly informing the public of what is forbidden. See *Breard v. City of Alexandria*, 341 U.S. 622 (1951), cited by the Court on the privacy point in *Redrup* (ordinance regulating the solicitation of homeowners as to commercial materials); *Rowan v. United States*, 397 U.S. 728 (1970) (federal statute allowing recipient of certain types of material in the mail to have his name removed from mailing lists); *Kovacs v. Cooper*, 336 U.S. 77 (1949) (ordinance prohibiting the use of sound trucks which emit loud and raucous noises).[4]

Washington, however, has passed no statute at all di-

4. *Public Utils. Comm'n v. Pollak*, 343 U.S. 451 (1952), also cited by the court in *Redrup*, was a civil action, not involving a statute, in which the court held that a regulatory commission's order authorizing piped-in music in District of Columbia street cars did not violate the passengers' First Amendment rights. *Close v. Lederle*, 424 F.2d 988 (1st Cir.), *cert. denied*, 400 U.S. 903 (1970), relied upon by the Washington Supreme Court, was also a civil action, involving a university's right to remove art displays from the corridor walls of the institution.

rected to the supposed harms described by its Supreme Court as justifying petitioner's conviction.

The standard set forth in *Roth* was carefully and precisely formulated; the Court recognized that only in this way can the obscenity standard have ascertainable meaning. *Roth v. United States*, 354 U.S. 476, 491 (1957). The Washington court has jettisoned this established meaning of obscenity and substituted one which is vague, overbroad and, indeed, incomprehensible.

The *Roth* standard requires that each motion picture be judged as a whole; a film cannot be suppressed merely because certain scenes are thought objectionable. *Jacobellis v. Ohio*, 378 U.S. 184 (1964); *Trans-Lux Distributing Corp. v. Regents of the University of New York*, 380 U.S. 259 (1965) (*per curiam*). Abandoning that rule, the court below asserts that "individual portions or scenes . . . become a movie by themselves" as to passersby and others outside the theatre (A. 88). Washington would thus purport to test each individual "scene" for thematic content, offensiveness, and redeeming social value.

But what is a "scene"? Would a single image flashed on the screen for a few seconds constitute a "scene" for purposes of invoking criminal liability? In numerous films on Biblical themes, or on the nature of contemporary life, or on many other subjects, one could single out a small part and declare it—wrenched from its context and viewed without the accompanying sound track—to have a predominantly prurient appeal and to be devoid of redeeming social value. Should all such pictures be barred from the outdoor screens? If so, that would surely eliminate from this important medium of communication all films having

any erotic content whatever.[5] The exhibitor would have no way rationally to decide which pictures to exclude. The concept of an individual "scene" being "obscene," even though the film itself is not, would afford him no guidance, for it defies comprehension—and the predictable result would be that timidity and over-caution which so effectively chill expression. *Cf. Smith v. California*, 361 U.S. 147 (1959).

In effect, the Washington court has strained to reassert the outmoded "isolated passages" test of *Regina v. Hicklin*, (1868) LR 3 QB 360, a test which this Court said in *Roth* "must be rejected as unconstitutionally restrictive of the freedoms of speech and press." 354 U.S. at 489. And it has further fragmented the work by allowing isolated passages to be judged in terms of visual content alone while ignoring the components of sound and setting. Such censorship is manifestly destructive of First Amendment freedom and contrary to the narrow exception for unprotected speech delineated by *Roth* and subsequent cases.

The opinion below deals in fact not with obscenity at all, but rather with material considered to be "offensive," as is shown by its repeated use of pejorative words which fall short of expressing any legal standard. The justices state that they found the film "*personally* distasteful, offensive and devoid of social, philosophical or artistic merit" (A. 89, emphasis added). They cite "offensive expression" (A. 93) and "[t]he right of the homeowner to be free

5. It is well established that such content in works of art, literature, and science is constitutionally protected. As the Court observed in *Roth v. United States*, 354 U.S. 476, 487 (1957):

> "Sex, a great and mysterious motive force in human life, has indisputably been a subject of absorbing interest to mankind through the ages; it is one of the vital problems of human interest and public concern."

from the intrusion of unsolicited offensive displays . . ." (A. 95) to justify petitioner's conviction. Such words are standardless. They could be indiscriminately applied not only to meritorious films having erotic content, but to those containing scenes of warfare, civil strife, or whatever else a "homeowner" might find "offensive." The court concludes that "obtrusive displays" of "lewd and offensive films" are punishable under the statute (A. 96). Yet the latter phrase is nowhere defined.

These lapses into vagueness reveal that Washington's transformation of the obscenity statute would deprive the law of its ascertainable, constitutional meaning and engraft upon it a second standard of unconstitutional breadth and obscurity. The court below has employed the very type of vague, overbroad language which has been repeatedly stricken down where First Amendment rights are at stake.[6] It has also attempted, without benefit of legislation, to restore to RCW 9.68.010 pre-*Roth* language of an unconstitutionally sweeping and vague nature which

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6. E.g., *Holmby Prod., Inc. c. Vaughn*, 350 U.S. 870 (1955) (not "of a moral, educational or amusing character"); *Gelling v. Texas*, 343 U.S. 960 (1952) ("cruel, obscene, indecent and immoral, or tend to debase or corrupt morals . . ."); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) ("sacreligious"); *Trans-Lux Distributing Corp. v. Maryland State Board of Censors*, 240 Md. 98, 213 A.2d 235 (1965) and *Dunn v. Maryland State Board of Censors*, 240 Md. 249, 213 A.2d 751 (1965) ("dominant purpose or effect is erotic or pornographic, or if it portrays acts of sexual immorality, lust or lewedness, or if it expressly or implicitly presents such acts as desirable, acceptable or proper patterns of behavior"); *Kingsley Corp. v. Regents*, 360 U.S. 684 (1959) ("acts of sexual immorality . . . as desirable, acceptable, or proper patterns of behavior"); *Interstate Circuit, Inc. v. Dallas*, 390 U.S. 676 (1968) ("sexual promiscuity . . . in such a manner as to be, in the judgment of the court, likely to incite or encourage delinquency or sexual promiscuity . . . etc.").

was removed from the statute by the 1961 state legislature.[7]

This Court has repeatedly made clear, both before and since the decision in *Redrup*, that general obscenity statutes may constitutionally be enforced only against materials which are obscene under the *Roth* test (see, *e.g.*, the cases cited *supra* at footnote 3). Yet the Washington Supreme Court here asserts that "the analysis of the trial court did not have to be guided solely by the *Roth* definition" (A. 88-89), since four decisions of this Court are said to have "inaugurated a 'contextual' approach to materials not strictly definable as obscene" (A. 91).

The cases cited are *Redrup, supra*; *A Book v. Attorney General*, 383 U.S. 413 (1966); *Ginzburg v. United States*, 383 U.S. 463 (1966); and *Mishkin v. New York*, 383 U.S. 502 (1966). None of those decisions, however, lends the slightest support to the notion that one who disseminates constitutionally protected material may be convicted under a general obscenity statute. In *Ginzburg* the defendant had virtually proclaimed the obscenity of the materials in the course of "commercial exploitation of erotica solely for the sake of prurient appeal." 383 U.S. at 465-66. Each publication "was originated or sold as stock in trade of the sordid business of pandering. . . ." 383 U.S. at 467. While holding that evidence of pandering is probative in close cases, the Court said:

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7. The current statute is set forth *supra*, p. 3. The predecessor statute, originally enacted in 1909, proscribed the dissemination of materials which were, *inter alia*, "indecent" or "immoral." See Revised Code of Washington Annoted, Ch. 9.68, pp. 153-4. The prior law was held unconstitutional for lack of a scienter requirement in *State ex rel. Lally v. Gump*, 356 P.2d 289 (Wash. 1960). The next session of the legislature enacted the present statute directed only to obscene materials.

"It is important to stress that this analysis simply elaborates the test by which the obscenity *vel non* of the material must be judged." 383 U.S. at 475.

Thus *Ginzburg* enunciated a rule of evidence, while preserving the requirement that the prosecution satisfy the *Roth* standards in order to convict.[8] Nor is any abandonment of the *Roth* test suggested by *Redrup's reversal* of three obscenity convictions. The Court's reference there to possible concerns over juveniles and assaults upon privacy, 386 U.S. 767, cannot fairly be read to imply that, having failed to legislate in the field, a State may indiscriminately wield its obscenity statute, destroying established standards in the process.[9]

In attempting to punish the showing of "offensive" films on drive-in screens by misapplying its obscenity law, Washington has violated the rule that a statute containing indefinite standards for the restriction of speech is invalid under the due process clause. The public must be fairly apprised of what is forbidden. In *Winters v. New York*, 333 U.S. 507 (1948), the Court said: "There must be ascertainable standards of guilt. Men of common intelligence cannot be required to guess at the meaning of the enactment." *Id.* at 515. And it is no answer that the meaning of a speech-restricting statute could be filled in by judicial

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8. The same is of course true of the companion case of *A Book v. Attorney General*, where the court reiterated and summarized the *Roth* requirements. 383 U.S. 413, 418 (1966).

9. *Cf. Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284 (1971), where the Court rejected privacy arguments advanced to support the conviction of one who wore an offensive sign on his jacket, noting that the statute involved evinced no concern with privacy "but, instead, indiscriminately sweeps within its prohibitions all 'offensive conduct' that disturbs 'any neighborhood or person.'" 29 L.Ed.2d at 292.

construction; such content cannot constitutionally be supplied by a series of criminal prosecutions. *Dombrowski v. Pfister*, 380 U.S. 479, 490-491 (1965).

II. THE CONVICTION OF PETITIONER FOR EXHIBITING A NON-OBSCENE MOTION PICTURE AT A DRIVE-IN THEATER IN A MANNER ALLEGED TO BE "OBTRUSIVE," WHERE THE STATE HAD ENACTED NO STATUTE DEFINING ANY SUCH CRIME, AND THERE WAS NO EVIDENCE THAT ANY NEARBY RESIDENT HAD COMPLAINED ABOUT THE FILM OR EVEN SEEN IT, DEPRIVES HIM OF DUE PROCESS OF LAW.

A further deprivation of due process is entailed in Washington's judicial extension of its obscenity statute to punish the exhibition of a non-obscene film on grounds of invasion of privacy.

The State has not enacted a statute of the "offensive display" type, although other jurisdictions have done so.[10] Nor, as the court itself points out, had Washington even recognized a common law right of privacy until the day of the instant decision (A. 95-96).

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10. *E.g.*, New York Penal Law §§245.10-245.11, Chapter 962, Laws of 1971, prohibiting the display of materials depicting nudity and sexual conduct "in such manner that the display is easily visible from or in any public street . . ." and containing detailed definitions of the terms "nudity" and 'sexual conduct;" and Arizona House Bill 301, approved May 10, 1971, prohibiting the public display of certain defined "explicit sexual material" in locations "easily visible from a public thoroughfare, from the property of others, or from commercial business premises generally open to minors at the time of such placing." In upholding the New York statute on November 9, 1971, the Criminal Court of New York County observed: "We are not dealing here with an obscenity statute. . . . The primary issues involved are whether the provisions of a penal statute are sufficiently definite to give reasonable notice of the prohibited conduct . . . It would be difficult to construct a statute less vague (than §§245.10-.11)." *People v. Lou Bern Broadway, Inc.*, unofficially reported at *New York Law Journal*, November 10, 1971, pp. 17-18.

The statute invoked against petitioner, RCW 9.68.010—passed in its present form in 1961, following the *Roth* decision—necessarily carried to petitioner and others a specific meaning: that criminal sanctions could follow from the dissemination, with knowledge of its contents, of a motion picture which was obscene when taken as a whole within the meaning of *Roth* and subsequent decisions.

The statute said nothing about proscribing individual scenes, and nothing about anyone's right to privacy.

The State's judicial pronouncements, moreover, had supported the protection of motion pictures under the freedom of speech guaranty, excepting those which were obscene. *Fine Arts Guild, Inc. v. Seattle*, 445 P.2d 602 (Wash., 1968).

Thus nothing in the statute or elsewhere gave petitioner notice that he could be prosecuted for exhibiting a non-obscene film at a drive-in the screen of which was visible from afar. The holding below that a property owner's right to be free of "offensive displays" is "obviously paramount" to the exhibitor's right of expression is not supported by any prior decision, nor had the State legislature expressed any such value judgment. Instead, the Washington court attempts to create a new common law crime. But it has failed to observe the rule that the definition of a crime may not be supplied judicially, in a defendant's own case, where prior fair notice was lacking. *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

Closely in point is the Court's recent reversal of a speech-punishment conviction in *Cohen v. California*, 403 U.S. 15, 29 L.Ed.2d 284 (1971):

> "In the first place, Cohen was tried under a statute applicable throughout the entire State. Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested *must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places.*" 29 L.Ed.2d at 290. (Emphasis added)

Cohen thus preserves, while the decision here below would forfeit, the basic due process rights of fair notice and hearing on a specified charge enunciated in *Cole v. Arkansas*, 333 U.S. 196 (1948). As the Court held in *Bouie v. Columbia*, 378 U.S. 347 (1964):

> "There can be no doubt that a deprivation of the right of fair warning can result not only from vague statutory language *but also from an unforeseeable and retroactive judicial expansion of narrow and precise statutory language.* As the Court recognized in *Pierce v. United States*, 314 U.S. 306, 311, 'judicial enlargement of a criminal Act by interpretation is at war with a fundamental concept of the common law that crimes must be defined with appropriate definiteness.'" *Id.* at 352. (Emphasis added)

Moreover, Washington has undertaken this remarkable *ex post facto* extension of its obscenity statute on the basis of a factual record which falls far short of showing the "assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling

individual to avoid exposure to it" mentioned in *Redrup, supra,* 386 U.S. at 769.

The court's opinion eliminates the presence of juveniles voluntarily watching the film through the fence as a basis for affirmance, on the ground that the state had not yet passed a statute specifically directed to juveniles[11] (A. 96-99). (It is not explained why the absence of a statute should not be equally fatal to the invasion-of-privacy argument.) The opinion also appears to eliminate the privacy of passing motorists as a ground of decision, since they would obtain only short glimpses of the screen (A. 95). Thus the decision rests solely upon the supposed privacy interests of householders having the screen in sight (A. 95-96).

Yet the occupants of houses in the vicinity would obviously have but a silent view of a distant screen, and would watch the images thereon, beyond an occasional glimpse, only to the extent that they chose to do so. Totally absent here is the kind of inescapable intrusion involved in such cases as *Breard v. City of Alexandria* and *Kovacs v. Cooper, supra.* And paradoxically, under the court's "individual scenes" concept of obscenity, the householder who took time to watch the *entire film* through his window would presumably restore the work to constitutional protection.

Here, the record shows no complaints about the film from householders or anyone else. There is no evidence that anyone from a nearby house even saw any part of the picture. The required "showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen v. California,* 403 U.S. 15 (1971), is miss-

11. It has since done so, RCW 9.68.060.

ing. Petitioner's conviction rests upon the assumption that someone in a neighboring house might have seen the film, and *might* have felt his privacy invaded by it. But here, as in *Cohen v. California, supra,*

> ". . . the mere presumed presence of unwitting listeners or viewers does not serve automatically to justify curtailing all speech capable of giving offense." 29 L.Ed.2d at 291.

The foregoing infirmity in the opinion below is recognized by Justices Finley and Neill, who concur in the result.[12] They conclude that the majority's rationale is in error because:

> "Decisions of the federal courts in the area here involved seem to me to indicate that the First Amendment rights cannot be circumscribed absent clear proof of an *actual assault* upon the rights of a non-consenting individual." (A. 103; emphasis in original.)

The deprivation of due process is thus exacerbated by the utter absence of proof of a necessary element of the supposed crime. *Thompson v. City of Louisville,* 362 U.S. 199 (1960).

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12. The concurrence is on the ground of alleged "pandering" within the meaning of *Ginzburg v. United States,* 383 U.S. 463 (1966). That view, not shared by the majority below, is insupportable because (a) the film does not present a "close case" as to obscenity, and (b) there is no evidence whatever of record concerning its advertising or promotion.

III. THE STATE'S SEIZURE OF A MOTION PICTURE UNDER A WARRANT ISSUED SOLELY ON THE TESTIMONY OF A POLICE OFFICER WHO HAD SEEN LESS THAN ALL OF THE FILM, WHERE NO PRE-SEIZURE ADVERSARY HEARING WAS HELD, VIOLATES THE FIRST AND FOURTEENTH AMENDMENTS.

The Washington Supreme Court held that the *ex parte* hearing which the justice of the peace conducted prior to issuing an arrest warrant satisfied the requirements established by this Court for the seizure of allegedly obscene materials. That hearing consisted entirely of testimony by one police officer who had never seen the entire motion picture and who was unable to testify regarding the thematic content of the film because he viewed it from outside the theatre grounds and did not hear the sound track. The officer's testimony accordingly was limited to a verbal description of isolated scenes (A. 8).

The justice of the peace issued the warrant solely upon the basis of this testimony; he did not view the film himself. In fact, the magistrate failed even to issue a *search* warrant which described in detail the film to be seized, as required by the Fourth Amendment, *Marron v. U.S.*, 275 U.S. 192 (1927). Rather, he merely issued a warrant for the arrest of "John Doe," and left it to the officers to carry it out and to seize the motion picture.[13]

In *Marcus v. Property Search Warrant*, 367 U.S. 717 (1961), this Court held that the First and Fourteenth

13. Use of this procedure is alone sufficient to invalidate the seizure of the film. As this Court emphasized in *Stanford v. Texas*, 379 U.S. 476, 485 (1945):

> ". . . [T]he constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain."

Amendments require that a magistrate utilize a "procedure . . . designed to focus searchingly on the question of obscenity" before he issues a warrant for the seizure of allegedly obscene publications. A procedure in which the magistrate relied upon the conclusory affidavits of a police officer, without inspecting the materials himself, was there held insufficient. Three years later, in *A Quantity of Books v. Kansas*, 378 U.S. 205 (1964), a magistrate had conducted a forty-five minute *ex parte* hearing in which he examined seven books offered as examples of thirty-one paperback novels sought to be seized and destroyed. Although the magistrate had reviewed some of the materials, the Court held that *Marcus's* requirement of a searching inquiry into the question of obscenity can be fulfilled only by affording an opportunity for a pre-seizure *adversary* hearing:

> "A seizure of all copies of the named titles is indeed more repressive than an injunction preventing further sale of the books . . . . [T]he Constitution requires a procedure 'designed to focus searchingly on the question of obscenity,' *Marcus*, 367 U.S. p. 372, 6 L.Ed.2d 1136. We therefore conclude that in not affording [the bookstore operator] an adversary hearing, the procedure leading to the seizure order was constitutionally deficient . . . .
>
> • • • •
>
> "Nor is the order under review saved because, after all 1,715 copies were seized and removed from circulation, [the bookstore operator] was afforded a full hearing on the question of obscenity. *For if seizure of books precedes an adversary determination of their obscenity, there is danger of abridgement of the right of the public to unobstructed circulation of nonobscene books.*" *Id.* at 210-11, 212-13; (Emphasis added).

The same standard of a searching inquiry has been held applicable in the case of an evidentiary seizure of a motion

picture film, although the Court has not yet been required to decide whether the standard invariably calls for a pre-seizure adversary hearing in such cases. *Lee Art Theatre v. Virginia*, 392 U.S. 636 (1968).

Six federal circuits have considered the question and have concluded that the danger of inhibiting access to non-obscene written materials which required an advisory hearing in *A Quantity of Books, supra*, is equally compelling in the case of seizure of a motion picture film. *United States v. Alexander*, 428 F.2d 1169 (8th Cir. 1969); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), *reversed on other grounds*, 28 L.Ed.2d 528 (1971); *Astro Cinema Corp. v. Mackell*, 422 F.2d 293 (2d Cir. 1970); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1970); *Cambist Films, Inc. v. Duggan*, 420 F.2d 687 (3d Cir. 1969).

The present record is striking evidence that only an adversary procedure can ensure that the magistrate's attention will be directed to the relevant legal principles, and that he will not issue a warrant without consideration of its impact upon protected speech. Even by *ex parte* standards, the procedure followed here was deficient. The magistrate employed only the Fourth Amendment "probable cause" test (A. 13-14), which necessarily falls short of the First Amendment requirement. See *Merritt v. Lewis*, 309 F. Supp. 1249, 1251 (E.D. Cal. 1970). And at the very least, a hearing cannot constitute a "searching inquiry" unless testimony is received from one who has seen, and heard, the entire motion picture, or unless the magistrate himself views the film before issuing the warrant. *Marcus v. Property Search Warrant*, 367 U.S. 717, 731-32 (1961).

The Washington Supreme Court held that *Marcus* and *A Quantity of Books* require a pre-seizure adversary hearing only where, as in those cases, a warrant is sought for the seizure of large numbers of publications in the course of civil proceedings looking toward their destruction. The court reasoned that the seizure of "Carmen Baby" for use as evidence in petitioner's criminal prosecution involved only a "temporary" restraint of a single motion picture film and that the length and scope of the restraint imposed by the seizure, and the danger that nonobscene items would be seized, were therefore considerably less than in *Marcus* and *A Quantity of Books*.

But Washington has vastly underestimated the extent to which the arrest of a film exhibitor and evidentiary seizure of his film can restrain the exercise of First Amendment rights. Characterization of such a seizure as "temporary" ignores the fact that criminal prosecutions may involve restraints on dissemination for periods of time substantially beyond the maximum period of restraint considered constitutionally permissible in other contexts. *United States v. Thirty-Seven Photographs*, 28 L.Ed.2d 831 (1971).

For example, here more than six months elapsed between the seizure and petitioner's trial *de novo* in Superior Court, and more than a year between the seizure and the trial court's entry of findings and judgment. During all of that time the film was impounded and its exhibition prevented —a far longer period than the seventy-four day maximum set by the Court in *Thirty-Seven Photographs, supra* (Tr. 10). Yet the Superior Court, and later the Washington Supreme Court, held in effect that "Carmen Baby" *was* capable of lawful dissemination to the public (for exam-

ple, in an indoor theatre or an outdoor theatre enclosed by an opaque fence). Thus the lack of any adequate pre-seizure hearing effectively contributed to the suppression of an non-obscene film for a period of a year at the trial court level—precisely the danger which caused this Court to require a pre-seizure adversary hearing in *A Quantity of Books v. Kansas*, 378 U.S. 205, 211 (1964).

Furthermore, it is incorrect to assume, as the Washington court has done, that the scope of the suppression is small when only a single copy of a film is seized. A film such as "Carmen Baby" which is held for public exhibition, unlike a single book, is directed at all those who would be in the audience—not at a single purchaser:

> "Preventing this number of persons from viewing a film is certainly equivalent to seizing all copies of a book from the newsdealers involved in *A Quantity of Books;* in the functional terms we must use to balance the interest in suppressing obscenity against that of ensuring distribution of non-obscene views, the restraint here and in *Bethview* is, if anything, more substantial than the seizure of less than 200 books." *Astro Cinema Corp. v. Mackell*, 422 F.2d 293, 295 (2d Cir. 1970).

Even assuming that the exhibitor could obtain another film print—which is unlikely in a small city such as Richland, Washington—the fact of his previous arrest would certainly deter him, and other exhibitors in the area, from obtaining and showing another print until the final judicial determination of its protected character. Arrest and seizure therefore equal complete suppression. "Functionally an arrest resembles a non-judicially imposed injunction against certain conduct. . . ." H. Monaghan, *First Amendment Due Process*, 83 Harv.L.Rev. 518 (1970).

Seizure without an adversary hearing—which readily results, as it did here, in de facto censorship for months on end—is a classic example of the kind of excessive regulatory technique which was emphatically rejected in *Butler v. Michigan*, 352 U.S. 380 (1957).

CONCLUSION

For the foregoing reasons, the judgment of the Supreme Court of Washington should be reversed.

Respectfully submitted,

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SUPREME COURT, U. S.

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971

No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent,

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE AND BRIEF OF MORALITY IN MEDIA INC., AS AMICUS CURIAE

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1971
No. 71-247

WILLIAM RABE,

Petitioner,

vs.

STATE OF WASHINGTON,

Respondent,

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

Morality In Media Inc. hereby respectfully moves for leave to file as Amicus Curiae in this case the brief appended hereto. The consent of the Attorneys for the Respondent has been refused since said Attorneys had previously refused a request for the filing of Amicus briefs by the Motion Picture

Association of America, Inc. and the National Association of Theatre Owners, Inc. Attorneys for Respondent, however, urged movant to enter the case as Amicus through the medium of a Motion for Leave to File Brief. Counsel for Petitioner is unwilling to consent and suggests that it should be left to this Court to decide whether Amicus briefs should be received.

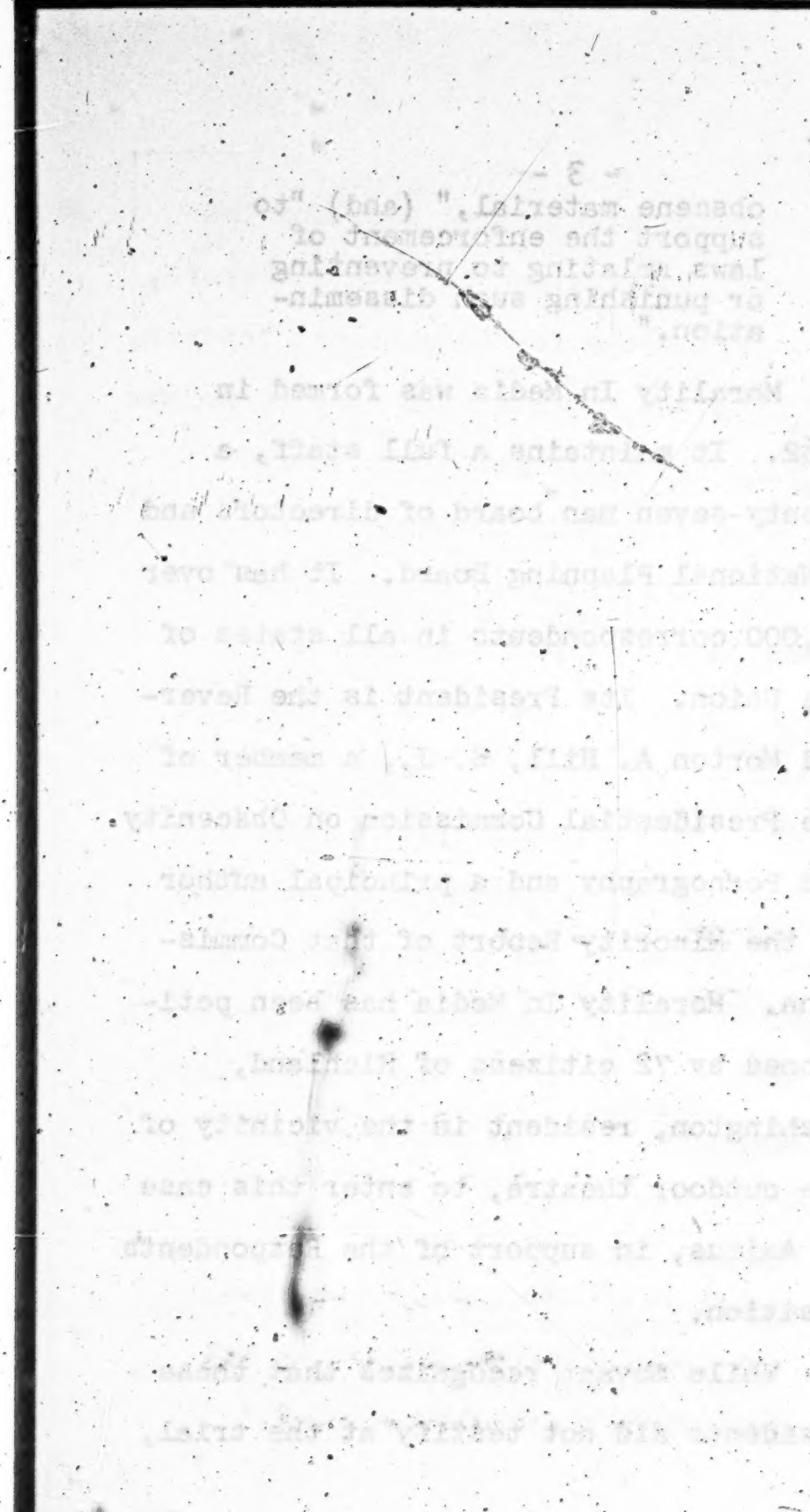
Morality In Media is an Interfaith charitable organization with National Headquarters at 487 Park Avenue, in New York City, organized as a membership corporation under the laws of the State of New York. The purposes of the Organization are:

> "to initiate, promote, encourage and coordinate activities designed to safeguard and advance public morality, combat community and family deterioration through * * * preventing the sale of * * *

obscene material," (and) "to support the enforcement of laws relating to preventing or punishing such dissemination."

Morality In Media was formed in 1962. It maintains a full staff, a twenty-seven man board of directors and a National Planning Board. It has over 35,000 correspondents in all states of the Union. Its President is the Reverend Morton A. Hill, S. J., a member of the Presidential Commission on Obscenity and Pornography and a principal author of the Minority Report of that Commission. Morality In Media has been petitioned by 72 citizens of Richland, Washington, resident in the vicinity of the outdoor theatre, to enter this case as Amicus, in support of the Respondent's position.

While movant recognizes that these residents did not testify at the trial,



and that any objection that they may have is not part of the record to be considered on appeal, nevertheless, they would appear to have a sufficient interest in the outcome of these proceedings to petition this honorable Court to enter this case as Amicus or request others to do so.

Because Morality In Media believes that certain issues raised by this case, for example, whether utterly without redeeming social value is, or is not, a constitutionally required test for obscenity and the constitutional restrictions, if any, on the states right to prohibit "intrusive" motion pictures, are of the most vital concern to all of the people of the United States and have not been adequately covered in the briefs of the parties, it respectfully requests

permission to file the within Brief Amicus Curiae.

Respectfully submitted,
CONSTANTINE REGUSIS,
Attorney for Morality
In Media Inc.,
Amicus Curiae

Paul J. McGeady
of Counsel

ARGUMENT

I.

THERE WAS NO ERROR IN CONVICTING PETITIONER OF A VIOLATION OF THE GENERAL OBSCENITY STATUTE OF THE STATE OF WASHINGTON SINCE "CARMEN BABY" IS OBSCENE BY STANDARDS ESTABLISHED BY THIS COURT.

The pertinent statute of the State of Washington, RCWA 9.68.010 (2), provides that every person who causes to be exhibited a "motion picture" * * * "which is obscene" * * * "shall be guilty of a misdemeanor". The word "obscene" is not further defined. Under the rationale therefore, of the Butler[1], Roth [2] and Kingsley [3] Cases,

---

1. Butler v. Michigan, 352 U.S. 380 (1957)
2. Roth v. United States and Alberts v. California, 354 U.S. 476 (1957)
3. Kingsley International Pictures Corp. v. Regents 360 U. S. 684 (1959)

We must look to the decisions of this Court for the meaning of that word when used in a State criminal statute. There is only one Supreme Court Opinion where "obscene" is defined. This is the familiar Roth Case.

Justice Brennan, speaking for a majority of the Court in that case said at 354 U. S. 481:

> "The dispositive question is whether obscenity is utterance within the area of protected speech and press. Although this is the first time the question has been squarely presented to this Court * * * expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press" (quoting 10 prior Supreme Court cases) * * *.
>
> "It is apparent that the unconditional phrasing of the First Amendment was not intended to protect every

utterance." * * *

"All ideas having even the slightest social importance - unorthodox ideas, controversial ideas, even ideas hateful to the prevailing climate of opinion -- have the full protection of the guaranties, unless excludable because they encroach upon the limited area of more important interests. But implicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance. This rejection for that reason is mirrored in the universal judgment that obscenity should be restrained reflected in the international agreement of over 50 nations, in the obscenity laws of all of the 48 states and in the 20 obscenity laws enacted by Congress, from 1842 to 1956. This is the same judgment expressed, by this Court in Chaplinsky vs. New Hampshire, 315 U.S. 568 * * * "

"* * * There are certain well defined and narrowly limited classes of speech, the prevention and punish-

> ment of which have never been thought to raise any constitutional problem. These include the lewd and obscene . . . It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality" (Emphasis supplied by the Court.)
>
> * * *
>
> "We hold that obscenity is not within the area of constitutionally protected speech or press. * * *
>
> "Sex and obscenity are not synonymous. Obscene material is material which deals with sex in a manner appealing to prurient interest."

The Court then refers us to a footnote for the definition of "prurient interest":

> "i. e. material having a tendency to excite lustful thoughts. * * * we perceive no significant difference

> between the meaning of obscenity developed in the case law and the definition of the American Law Institute Model Penal Code * * * viz. 'a thing is obscene, if, considered as a whole, its predominant appeal is to prurient interest i. e. a shameful or morbid interest in nudity, sex or excretion and if it goes beyond substantially beyond customary limits of candor in description or representation of such matters . . ."

Finally, the Court gives us this test:

> "Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest."

* * *

In the Roth Case, this Court quotes with approval the trial Judge's charge to the jury reading as follows:

> " '. . . the test is not whether it would arouse

sexual desires or sexual impure thoughts in those comprising a particular segment of the community, the young, the immature, or the highly prudish or would leave another segment, the scientific or highly educated or the so-called worldly-wise and sophisticated indifferent and unmoved . . . the test in each case is the effect of the book, picture or publication considered as a whole, not upon any particular class, but upon all those whom it is likely to reach. In other words, you determine its impact upon the average person in the community. The books, pictures and circulars must be judged as a whole, in their entire context and you are not to consider detached or separate portions in reaching a conclusion. You judge the circulars, pictures and publications which have been put in evidence by the present-day standards of the community. You may ask yourselves does it offend the common conscience of the community by present-day standards.'"

"In this case, ladies and gentlemen, you and you alone are the exclusive judges of what the common conscience of the community

> is, and in determining that conscience you are to consider the community as a whole, young and old, educated and uneducated, the religious and irreligious -- men, women and children.'"

Justice Harlan, in his concurring opinion, in the Alberts Case, at 354 U. S. 501 states:

> "It seems to me clear that it is not irrational, in our present state of knowledge to consider that pornography can induce a type of sexual conduct which a State may deem obnoxious to the moral fabric of society. * * *
>
> "Furthermore, even assuming that pornography cannot be deemed ever to cause, in an immediate sense, criminal sexual conduct, other interests within the proper cognizance of the States may be protected by the prohibition placed on such materials. The state can reasonably draw the inference that over a long period of time the indiscriminate dissemination of materials, the essential character of which is to degrade sex, will have an eroding effect on moral standards. * * *"

"Since the domain of sexual morality is preeminently a matter of State concern, the Court should be slow to interfere with State legislation calculated to protect that morality."

COMMENT

The Roth-Alberts decision is of the greatest importance not only because it firmly decided that obscenity is proscribable both under state and federal law, but because it is the only decision of the United States Supreme Court which sets forth the test for obscenity.

We read that Court decision as standing for the following propositions:

1. The test for obscenity is

"Whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to the prurient interest."

2. Once material is adjudged to be obscene by a jury

(or judge) applying this test or its equivalent then, since it is obscenity, it is conclusively presumed as a matter of law to be "utterly without redeeming social importance."

3. Such lewd and obscene utterances may have some "social value" but, "any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

4. Obscenity is not protected free speech.

5. A charge to the jury that includes only the prurient interest test (or its equivalent) is constitutionally valid.

6. A statute proscribing "obscene" or "lewd" material is sufficiently precise.

7. Since obscenity is not protected free speech it is unnecessary to prove that it will "create a clear and present danger of anti-social conduct or will probably induce its recipients to such conduct."

8. The legal basis for obscenity laws is the "social interest

> in order and morality" or the prevention of "an eroding effect on moral standards."

There are various lower court decisions which have taken a later decision entitled, A Book Named Memoirs of A Woman of Pleasure vs. Attorney General 383 U. S. 413, (1966) as a modification of the Roth Case. However, it should be noted that the Court Reporter at 16 L.Ed. 2d. 1 states:

> "The * * * members of the Court * * * did not agree upon an opinion."

Justice Clark succinctly summarizes what happened in "Fanny Hill" when he said at 383 U. S. 441:

> "While there is no majority opinion in this case, there are three justices who import a new test into that laid down in Roth, namely that 'a book cannot be proscribed unless it is found to be utterly without redeeming social value'. I agree

with my Brother White that such a condition rejects the basic holding of Roth and gives the smut artist free rein to carry on his dirty business. My note in that case -- which is the deciding one for the majority opinion -- was cast solely because the Court declared the test of obscenity to be:
'whether to the average person, applying contemporary community standards, the dominant theme of the material taken as a whole appeals to prurient interest.'
I understood that test to include only two constitutional requirements: (1) the book must be judged as a whole, not by its parts; and (2) it must be judged in terms of its appeal to the prurient interest of the average person, applying contemporary community standards. Indeed, obscenity was denoted in Roth as having 'such slight social value as a step to truth that any benefit that may be derived . . . is clearly outweighed by the social interest in order and morality'. Moreover, in no subsequent decision of this Court has any 'utterly without redeeming social value' test been suggested much less expounded. The first reference

to such a test was made by my Brother Brennan in Jacobelis vs. Ohio * * * seven years after Roth in an opinion joined only by Justice Goldberg. * * * "
(Emphasis supplied)

Justice White, in his opinion in Fanny Hill, at 383 U. S. 460, stated:

"In Roth vs. United States * * * the Court held a publication to be obscene if its predominant theme appeals to the prurient interest in a manner exceeding customary limits of candor. Material of this kind, the Court said, is 'utterly without redeeming social importance' and is therefore, unprotected by the First Amendment.

"To say that material within the Roth definition of obscenity is nevertheless not obscene if it has some redeeming social value is to reject one of the basic propositions of the Roth Case -- that such material is not protected because it is inherently and utterly without social value.

"If 'social importance' is to be used * * * obscene material, however, far beyond customary

limits of candor, is immune if it has any literary style, if it contains any historical references or language characteristic of a bygone day, or even if it is printed or bound in an interesting way. Well written, especially effective obscenity is protected; the poorly written is vulnerable.

"A fortiari, if the predominant theme of the book appeals to the prurient interest as stated in Roth, but the book nevertheless contains here and there a passage descriptive of character, geography, or architecture, the book would not be 'obscene' under the social importance test. I had thought that Roth counseled the contrary: that the character of the book is fixed by its predominant theme and is not altered by the presence of minor themes of a different nature. The Roth Court's emphatic reliance on the quotation from Chaplinsky * * * means nothing less: * * * 'Such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and

morality'. (Emphasis supplied by Justice White.)

"In my view 'social importance' is not an independent test of obscenity but is relevant only to determine the predominant prurient interest of the material, a determination which the Court or the jury will make based on the material itself and all the evidences of the case, expert or otherwise."

COMMENT

The promotion of the opinion of Brennan-Warren and Fortas as a Court opinion that modified the Roth case has been both deceitful and insidious. Many states were urged to and did modify their obscenity statutes to build in a rule that actually contradicted the Supreme Court's holding in the Roth Case and the Roth test and today we are paying ten-fold for our lack of vigilance. Justice Clark's prophetic statement in the Fanny Hill case we

know now is true. He said such a condition "gives the smut artist free rein to carry on his dirty business." It is quite obvious that Justice Clark and White are correct when they say in Fanny Hill that there is no such test. We submit that "utterly without redeeming social importance"is not part of the definition of the word "obscene" nor part of the test for obscenity for the following reasons:

(1) There is no Court opinion in "Fanny Hill" and the opinions of three Judges out of nine do not constitute a binding precedent so as to require any court or Legislature to follow their suggestions. It is not the law of the land.

(2) Roth is a Court opinion and it does not use the phrase as part of the test for obscenity.

(3) Once the Roth test is applied to a disputed work and it is decided to be "obscene" then Roth conclusively presumes

the material to be utterly without redeeming social importance.

(4) Roth says obscenity has social value, but that value is outweighed by the interest in morality. Three Justices in Fanny Hill say if it has any social value it is not obscene. This contradicts Roth in an essential manner and is in error.

(5) The charge to the Jury approved in the Roth case did not have a "social value" or "social importance" or "Utterly without redeeming social value" test or phrase. Since Roth is still the only Supreme Court opinion on the definition of obscenity, then no social value "test" need be given to any Jury nor be made part of any statute. If it were a necessary charge to the Jury, Roth would have insisted upon it.

If further proof is needed that the Memoirs (Fanny Hill) three Justices opinion is not a precedent binding on anyone, it may be found in opinions of the United States Supreme Court itself.

In 29 American Jurisprudence Second at Section 195 of the topic "Courts", we find the following:

> "A decision by an equally divided court does not establish a precedent required to be followed under the stare decisis doctrine. And where the members of the court unanimously or by a majority vote reach a decision but cannot even by a majority agree on the reason therefor, no point of law is established by the decision and it cannot be a precedent covered by the stare decisis rule." (Emphasis supplied.)

As authority for this statement, American Jurisprudence quotes the United States Supreme Court case of United States v. Pink, Superintendent of Insurance of the State of New York 315 U. S. 203, (1941).

Referring to that case, we find the following rule:

> "Nor was our affirmance of the judgment in that case by

> an equally divided court an authoritative precedent. * * * The lack of an agreement by a majority of the court on the principles of law involved prevents it from being an authoritative determinate for other cases. Hertz vs. Woodman, 218 U.S. 205, 213-214."

In the Hertz Case, the United States Supreme Court made it crystal clear when it said:

> "The principles of law involved not having been agreed upon by a majority of the Court sitting prevents the case from becoming an authority either in this or in inferior courts." (Emphasis supplied).

Applying this to the Memoirs Case, it is quite clear that three is not a majority and therefore, in the words of this honorable Court, this prevents that case "from becoming an authority either in this or in inferior courts."[4]

4. Richard G. Kleindienst, the Deputy

Assuming that the "amorphus" test of "utterly without redeeming social value" is not part of the test for obscenity, does "Carmen Baby" meet the Prurient Interest test? Does it also go "substantially beyond the limits of candor?" The answer to this can be found in the opinion of the Supreme Court of the State of Washington below[5] when at 484 P. 2d. 922, Justice McGovern speaking in a majority Court opinion states:

F.N. 4 (Continued)
Attorney General of the United States on April 28, 1971, in a letter addressed to Hon. Thaddeus J. Dulski, Chairman of the House Committee on Post Office and Civil Service in commenting on Bill No. HR 2159, 92nd Congress, First Session (later passed overwhelmingly by the House and Referred to the Senate) which would define "obscene" as used in the Federal Statutes to make it clear that "utterly without redeeming social value" was not part of that definition stated:

F.N. 4 (Continued)

"We believe that the elimination of the 'social value' aspect may withstand constitutional scrutiny. It is well established that a plurality opinion is not binding precedent."

"While we recognize that congressional enactment of a definition of what is obscene and, therefore, not afforded the full protection of the First Amendment, would not be binding upon the Supreme Court, we have no objection to such an enactment as a statement of Congressional intent." (Hearings before the Sub-Committee on Postal Facilities and the mail of the Committee on Post Office and Civil Service - April 28; May 5, 1971 -- Serial No. 92 - 6 - U.S. Government Printing Office); See Also "The Social Value Hoax", May - June, 1971 issue of "The Prosecutor", magazine of the National District Attorney's Association.

> "We have considered the film 'Carmen Baby' with strict attention to those legal touchstones and assert that the dominant theme of the motion picture appeals to the prurient interest: the quantity and variety of sexual acts implied or expressly shown on the screen is out of proportion to its necessity or its part in the film's theme."

It is submitted that in addition to confirming that the dominant theme appeals to the prurient interest, the Court by this statement clearly indicated that it went beyond the limits of candor. This later fact is additionaly emphasized by the description of the scenes from the motion picture as described by the police officer in the Justice Court, and

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5. State vs. Rabe, 79 Wash. 2d. 254, 484 P. 2d. 917 (1971).

the description contained in the October 7, 1968, decision of Justice Yencopal.

Amicus respectfully submits that Justice McGovern's reference to the binding effect of Jacobellis[6] and Memoirs[7] is mistaken for the simple reason that neither of them enunciate a court opinion. They are simply cases, containing decisions on the facts of their cases and individual non-binding opinions of individual justices. In addition the individual justices opinions relied on contradict Roth in a fundamental manner and are, therefore, in error.

It is respectfully urged that this court take this opportunity to

6. Jacobellis vs. Ohio, 378 U. S. 184 (1964)
7. 383 U. S. 413 (1966)

reiterate Roth as the sole test for obscenity unencumbered by subsequent no-majority cases.

II. PRIOR ADVERSARY HEARING NEED NOT PRECEDE THE SEIZURE OF A MOTION PICTURE AS EVIDENCE IN A CRIMINAL TRIAL OF THE EXHIBITOR

In addition to the analysis of this point made by the Court below, in which Amicus concurs, we desire to bring to the Court's attention the fact that the constitutional basis for the contentions advanced in such cases as United States v. Alexander, 428 F. 2d. 1169 (8th Circuit 1970) and Demich Inc. v. Ferdon, 426 F. 2d. 643 (9th Circuit 1970) has disappeared with this Court's decision in United States v. Thirty-Seven Photographs, 402 U. S. 363 (May 1971). In that case, customs agents seized a quantity of allegedly obscene material

and within two weeks commenced forfeiture proceedings. A three judge Federal District Court ruled the seizure illegal because of failure to obtain prior judicial approval. This Court reversed noting that the forfeiture proceedings began within fourteen days and concluded within sixty days. The instant proceeding was began by Judge Yencopal issuing a warrant on August 30, 1968, a denial of a motion to suppress the seized film on September 27, 1968, and a final determination that the film was obscene on October 7, 1968. This timing is well within the sixty-day limit set down in U. S. v. Thirty-Seven Photographs.

Other Federal cases relied upon by Petitioner are Astro Cinema Corp. Inc. vs. Mackell, 422 F. 2d. 293 (2nd Cir. 1970), and Bethview Amusement Corp.

v. Cahn, 416 F. 2d. 410 2nd Circuit 1969) cert. denied, 397 U. S. 920 (1970). These cases were recently considered in a December 1, 1971 decision of the New York Court of Appeals (5 to 2) in the case of People v. Saul Heller, N. Y. Law Journal, Page 1, December 16, 1971. In that case, the Court of Appeals states that the above cases requiring prior adversary hearings "go beyond any requirement imposed on state courts by the Supreme Court." The New York Court carefully reviewed the decisions of this Court on judicial scrutiny in obscenity seizure cases and stated as follows:

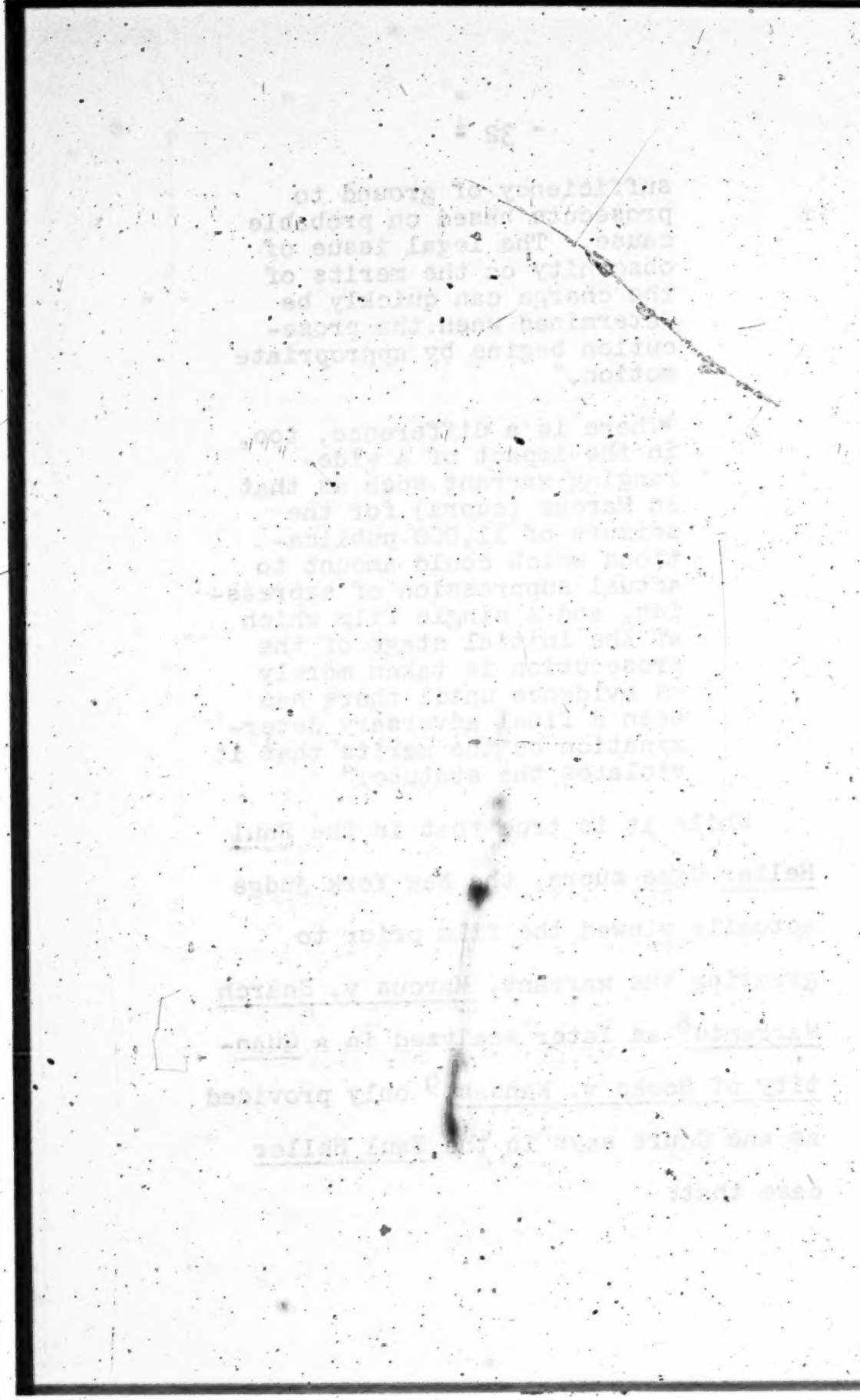
> "The warrants involved here were preceded by judicial scrutiny and were the result of a judicial determination. The additional question is whether the scrutiny should have been followed by an adversary hearing. The

Supreme Court has not held that; and its most recent comment on the problem suggests it is not moving in that direction. (Lee Art Theatre v. Virginia, 392 U. S. 636 (1967)." * * * "What is of relevancy for the present case is the observation by the Supreme Court that 'We need not decide in this case whether the justice of the peace should have viewed the motion picture before issuing the warrant' (p. 637) This implies that had the Justice done so, as the judge in the present case did, it would have been sufficient. There is no suggestion that an adversary hearing, an extreme departure from standard American practice on warrants, would also have been required"* * *.

"There are intrinsic procedural difficulties in requiring such hearings. The usual reason for an adversary hearing before a magistrate as to whether a warrant should or should not issue arises from a close issue as to whether there is a real basis in fact for probable cause to being" (bring?) "a prosecution***. He is deciding, on the warrant question, not guilt or innocense, but the prima facie

> sufficiency of ground to prosecute based on probable cause. The legal issue of obscenity on the merits of the charge can quickly be determined when the prosecution begins by appropriate motion."
>
> "There is a difference, too, in the impact of a wide-ranging warrant such as that in Marcus (supra) for the seizure of 11,000 publications which could amount to actual suppression of expression, and a single film which at the initial stage of the prosecution is taken merely as evidence until there has been a final adversary determination on the merits that it violates the statute."

While it is true that in the Saul Heller Case supra, the New York judge actually viewed the film prior to granting the warrant, Marcus v. Search Warrants[8] as later analyzed in a Quantity of Books v. Kansas,[9] only provided as the Court says in the Saul Heller case that:



> "the seizure of evidence as obscene, and arrests on this ground, should not be left to the judgment of policemen, but should have judicial supervision."

In the instant case, the record shows that the Justice of the Peace actually took testimony from the police officer about the obscene nature of the film and reached an independent judgment based on his judicial determination that there was probable cause to issue the warrant. He was not required at this preliminary stage to decide the issue of obscenity. Marcus does not require an adversary hearing nor does it require a particular mode of judicial scrutiny such as a requirement that the magistrate actually view the film.

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8. 367 U. S. 717 (1961)
9. 378 U. S. 205 (1964)

It should also be reiterated that only one copy of the film was seized for the purpose of evidence and it should be further noted that the broad statement in Marcus and A Quantity of Books [10] as interpreted above in Saul Heller requiring judicial scrutiny does not apply to all obscene seizures especially those involving copies seized for evidence such as a single copy of a film or a few copies of a book.

State vs. Hartstein, 469 S. W. 2d. 329, a recent 1971 decision of the Supreme Court of Missouri, states that if a seizure is made for purpose of destroying the thing seized and for the purpose of preventing dissemination of the material involved, an adversary hearing on issue of obscenity is required prior to seizure, but if, single

10. A non-majority opinion.

copy of film is seized for sole purpose of preserving it as evidence to be used in criminal action to be brought pursuant to a state statute constitutional on its face, such seizure is not violative of First Amendment guarantees, through seizure coincidentally prevents one particular copy from being further disseminated pending outcome of criminal proceedings. To the same effect is United States v. New Orleans Book Mark Inc., 328 F. Supp. 136 (U. S. District Court La. 1971). In passing, it should be noted that the Missouri Court in Hartstein joined a growing number of state courts in stating "social importance" is not an independent test of obscenity but is relevant only in determing predominant prurient interest of material.

III. STATE STATUTES PROHIBITING EXHIBITION OF OBSCENE FILM MAY BE VIOLATED EVEN THOUGH DISPUTED MATERIAL IS NOT OBSCENE IN THE ABSTRACT IF THE "SETTING" IN WHICH EXHIBITION TAKES PLACE IS CONSIDERED.

In Ralph Ginsburg, vs. United States 383 U. S. 463 (1966), this Court, in a majority opinion, decided that even if disputed material involved was not obscene in the abstract the trial judge's conclusion that the mailing of such material offended the general federal statute proscribing mailing "obscene" publications was sustained where the defendant engaged in the sordid business of pandering. This case may be applied to Rabe vs. Washington 79 Wash. 2d. 254, 484 P. 2d 917 (1971) by observing that that Court considered the "setting" in which the material was

presented as tipping the scale in favor of holding that it violates a proscription against obscenity.[11] See also State ex rel Sensenbrenner v. Adult Book Store 271 N. E. 2d 13, 1926 Ohio App. 2d. 183 (Ohio App. 1971) to this effect and Stanley vs. Georgia, 394 U. S. 557 at 567, (1969) and Papish v. Bd. of Curators, 331 F. Supp. 1321 (1971).

It should be noted that Petitioner's reliance on Jacobellis vs. Ohio, 378 U. S. 184 (1964) is misplaced for the simple reason that there is no Supreme Court Opinion in that case. The Court reporter states that the justices "were unable to agree upon an opinion in support of the decision." [12]

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11. In Ginsburg vs. U. S., the Court at 383 U. S. 465 stated:
"The question of obscenity may include consideration of the setting in which the publications were presented* * *."

Redrup,[13] while a per curiam decision contains no Court Opinion on the applicable definition of obscenity, but to the extent that Petitioner has cited it, it should be noted that the record does show that the prior complaint against Defendant's outdoor movie to the same magistrate by "unwilling individuals"! 14/ How can we assume as petitioner does that the homes facing this intrusive screen were full of willing, consenting (albeit non-paying) adults? See also Bread vs. Alexandria, 341 U. S. 622 relating to invasion of the privacy of the home.

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12. 378 U. S. 184, 12 L.Ed. 2d. 793/ (1964)
13. Redrup vs. New York, 386 U.S. 767 (1967)
14. Joint Appendix to Briefs, page 28, Case of State of Washington v. Rabe (1/9/67)

Closely analogous in principle to the instant case, is Pent - R - Books Inc. vs. United States Postal Service, 328 F. Supp. 297 (U. S. District Ct. E. D. N.Y. June 10, 1971) involving the Postal Reorganization Act of 1970,[15] where at page 307 the Court says:

> "The present complaint deals with matter that is not obscene under the test of Roth vs. United States * * * but that does not prevent the statute from being validly applicable. The fact that the books which are advertised are entitled to First Amendment protection does not mean that the mailer's right to communicate ideas supercedes the right of the addressee (to be let alone) Rowan 397 U. S. at 736, 90 S. St. at 1490. See Bread v. City of Alexandria, 341 U. S. 622 (1951)"

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15. 39 U. S. C. #3010 - 11;
18 U. S. C. #1735 - 37;
Pub. L. 91 - 375

Amicus respectfully claims that the principle in Pent -R- Books and Rowan to the effect that a man is entitled to be free in his home from unwanted intrusion of "Prurient" and "Patently Offensive" material applies in this Rabe Case.

In a sense, Stanley vs. Georgia's protection of a person's right to be secure in his home to view obscenity applies to a co-relative right to be free from the electric bill-board effect of an intrusive obscene screen, viewable from his bed room.

We also draw this Court's attention to its language in Reidel[16] and Thirty-Seven Photographs[17] which implies as B. J. George Jr., Professor of Law and Director of the Center for the Administration of Justice at Wayne

State University in Detroit, states in his article entitled, "The 1970 Supreme Court Term Criminal Law Decisions", New York Law Journal, December 15, 1971, at page 4:

> "*** a trend toward reconsideration of the premise on which Roth is generally taken to rest, namely that the First Amendment itself directly controls what material is subject to regulations and what is not and a recognition that the only legitimate questions under the constitution are whether the regulatory legislation is precise enough in language to pass muster when attacked on vagueness and indefiniteness grounds, and whether procedural due process, including compliance with Fourth Amendment require-

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16. U. S. v. Reidel, 402 U. S. 351 (1971)
17. 402 U. S. 363 (1971)

ments, has been accorded, the particular defendant. This, at any rate, seems to be the discretion (direction?) "in which Reidel and Thirty-Seven Photographs together appear to point."

CONCLUSION

For all of the foregoing reasons, the ruling and judgment of the Court below should be sustained.

Respectfully submitted,
CONSTANTINE REGUSIS
Counsel for
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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

BRIEF OF RESPONDENT

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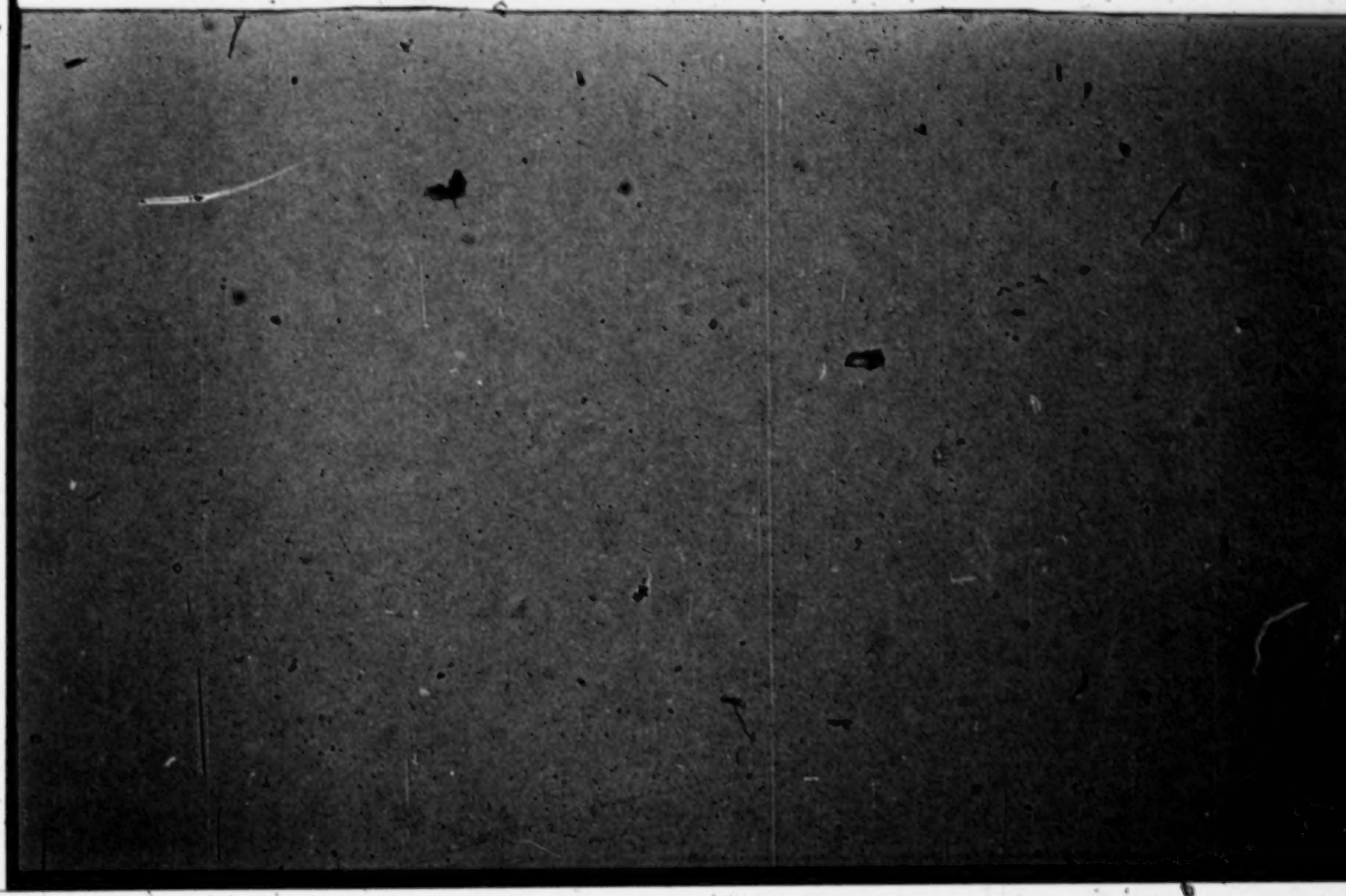

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON
Respondent.

BRIEF OF RESPONDENT

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment I:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

United States Constitution, Amendment V:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the

Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

United States Constitution, Amendment IX:

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

Laws of the State of Washington, 1961, Ch. 146, Sec. 1, codified as Sec. 9.68.010, page 153, Title A, Revised Code of Washington Annotated:

9.68.010 Obscene literature, shows, etc. Every person who —

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

COUNTER — STATEMENT OF THE CASE

On August 30, 1968, William Rabe was arrested by Richland police officers under the authority of a warrant issued by Justice of the Peace Albert J. Yencopal (App. 10) based on an alleged exhibition of an obscene motion picture. At the time of the arrest and incidental thereto, the Richland police officers seized the movie film "Carmen Baby" as evidence of the crime charged.

At the time of his arrest, William Rabe was the manager of the Park Y Drive-In Theatre. He had been once previously arrested on a citizen's complaint for a similar offense involving a motion picture entitled "The Notorious Daughter of Fanny Hill". The previous case was disposed of by an Order allowing bail forfeiture (App. 28) and a return of the seized film.

Prior to issuance of the warrant, a Richland police sergeant testified during a hearing conducted by Justice of the Peace Albert J. Yencopal, concerning various scenes of the movie "Carmen Baby" which was then playing at the Park Y Drive-In Theatre located in a residential area of Richland, Washington, where the theater screen is viewable from twelve to fifteen residences.

The purpose of the hearing was to determine if there was probable cause for the issuance of an arrest warrant for the manager of the drive-in theater (App. 8) for violation of Section 9.68.010, Revised Code of Washington, which provides:

> 9.68.010 Obscene literature, shows, etc. Every person who —

(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene, or

(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;

Shall be guilty of a gross misdemeanor.

At the hearing, only a portion of which was transcribed (App. 13), Justice of the Peace Yencopal, judicially scrutinized the complainant about the movie (App. 13), in a procedure "designed to focus searchingly on the question of obscenity" (App. 14). The police sergeant had previously viewed a portion of the movie on August 28, 1968, from outside the chain link fence enclosing the theater and practically the entire movie on August 29, 1968 (App. 8), from outside the theater in the company of the city attorney.

Upon a finding of probable cause an arrest warrant was issued and executed with the arrest of petitioner.

The following is a chronological summary of the proceedings in Justice Court:

(1) On September 3, 1968, petitioner appeared in Justice Court with his counsel and entered a plea of not

guilty along with a motion to dismiss which was taken under advisement (App. 26).

(2) On September 6, 1968, the case was continued without objection to September 13, 1968 (App. 27).

(3) On September 13, 1968, the motion to dismiss was denied (App. 27).

(4) On September 19, 1968, petitioner filed a motion to suppress (App. 11) which was followed by supporting and opposing briefs.

(5) Justice of the Peace Yencopal denied the motion to suppress by written Order dated September 27, 1968 (App. 12-15).

(6) Trial was held October 3, 1968, before Justice of the Peace Yencopal sitting without a jury (App. 27).

(7) On October 7, 1968, Justice of the Peace Yencopal entered his written decision (App. 16-25), finding the petitioner guilty of a violation of RCW 9.68.010.

Subsequently, petitioner gave notice of appeal and the appeal process followed with a trial de novo in Superior Court resulting in petitioner's conviction based on the context of the movie's exhibition. On appeal the Supreme Court of the State of Washington affirmed.

SUMMARY OF ARGUMENT

1. The display of an arguably obscene movie film at an outdoor theater in close proximity and in view of private residences is an obtrusive display and obscene in the context of its exhibition. Such a display is subject to the criminal sanctions of the state's obscenity statute, RCW 9.68.010, and criminal prosecution does not require an abstract determination of the obscenity *vel non* of the movie but may consider the use, setting and manner of display in determining whether it is obscene in such a context. The application of the state's obscenity statute in this manner does not inhibit expression or eliminate the film from display but merely restricts its showing in the particular setting of a drive-in theater with a theater screen visible from outside the theater.

2. Right of privacy does not depend on statute for its existence. It is a right "created by several fundamental constitutional guarantees", *Griswold v. Connecticut,* 381 U.S. 479, 485 (1965). In the context of its exhibition at an outdoor theater the motion picture "Carmen Baby" is obscene. The application of the state's obscenity statute, RCW 9.68.010, imposing criminal sanction for displaying an arguably obscene movie in such a setting does not deny due process of law.

3. The decision in *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968), indicates the sole requirement for seizure of film as evidence is a "'procedure 'designed to focus searchingly on the question of obscenity' ".

Equating the seizure of one copy of a film to a "mas-

sive seizure" is unrealistic and impractical. A distinction exists between a seizure aimed at suppression and a seizure aimed at obtaining evidence for use in a criminal trial. The nature and purpose of the seizure should determine if a prior adversary hearing is required. The procedures followed by the justice of the peace prior to seizure of the film "Carmen Baby" were consistent with the requirements of *Lee Art Theatre.*

ARGUMENT

I

A MOTION PICTURE WITH A DOMINANT THEME APPEALING TO A PRURIENT INTEREST IN SEX WHEN SHOWN OUTDOORS AND FOISTED OFF ON UNWILLING VIEWERS IS SUBJECT TO THE STATE'S OBSCENITY STATUTE AND CRIMINAL PROSECUTION MAY CONSIDER THE USE, SETTING AND MANNER OF DISPLAY

Petitioner questions whether he should be convicted under an obscenity statute when a movie containing numerous erotic scenes is exhibited by him in a drive-in theater in a manner permitting unwitting and unwilling persons to view portions out of context.

While the Superior Court did not make an abstract finding regarding the obscenity *vel non* of the movie as a whole and that question was not directly before the Supreme Court of Washington, the opinion indicates only a probability that it would pass the definitional test of obscenity enunciated in *Roth v. United States,* 354 U.S. 476 (1957). The justice of the peace who pre-

sided over the original trial did hold that the movie as a whole was obscene and that its dominant theme appealed to a prurient interest in sex (App. 24), described by the justice of the peace as follows:

> "Look at the numerous sex scenes. First the fondling of the breast, the fondling of the policeman's genitals, the naked (man) and woman in bed, and not husband and wife, the lengthy vivid and precise portrayal of every move — and from close up of the sex scene in bed when Carmen orally copulated the policeman and then a later scene when he did the same to her . . . the dance around the bottle wherein she masterbated (sic) herself . . . the lesbian scene with the wife of the parole board officer . . . all in fine and minute and closeup detail . . . and the act of sex intercourse which was taken through colored glasses and took about five minutes to portray . . . and numerous other short scenes . . ." (App. 24)

Likewise, at least one Justice of the Supreme Court of Washington would also hold the movie to be obscene under the definition of *Roth* (App. 101). The opinion of the Court while deciding that "the dominant theme of the motion picture appeals to the prurient interest" (App. 90), apparently withheld an abstract ruling on the obscenity *vel non* only because of the requirement that it be "utterly without redeeming social value".

Accordingly, in the *context* of its exhibition in a drive-in theater it was considered obscene (App. 90).

The judgment of the Washington Court does not infringe on the freedom of speech guarantee of the First and Fourteenth Amendments. It is a proper reliance on *Redrup v. New York*, 386 U.S. 767, 769 (1967), which stated:

"In none of the cases was there a claim that the statute in question reflected a specific and limited state concern for juveniles. See Prince v. Commonwealth of Massachusetts, 321 U.S. 158, 64 S.Ct. 438 88 L. Ed. 645; cf. Butler v. State of Michigan, 352 U.S. 380, 77 S.Ct. 524, 1 L. Ed. 2d 412. *In none was there any suggestion of an assault upon individual privacy by publication in a manner so obtrusive as to make it impossible for an unwilling individual to avoid exposure to it.* Cf. Breard v. City of Alexandria, 341 U.S. 622, 71 S.Ct. 920, 95 L. Ed. 1233; Public Utilities Comm'n of District of Columbia v. Pollak, 343 U.S. 451, 72 S.Ct. 813, 96 L. Ed. 1068. And in none was there evidence of the sort of 'pandering' which the Court found significant in Ginzburg v. United States, 383 U.S. 463, 86 S.Ct. 942, 16 L. Ed. 2d 31." (Emphasis added)

The language quoted does not suggest that a separate statute is required for obtrusive displays as it does in the case of a concern for juveniles.

The holding of *Redrup, supra,* was reaffirmed in *Stanley v. Georgia,* 394 U.S. 557 (1969) and approved in *United States v. Reidel,* — U.S. —, 28 L. Ed. 2d 813 91 S. Ct. 1410 (1971) (concurring opinion by Mr. Justice Marshall.)

The same consideration of the context in which a work is exhibited was expressed by this Court in *A Book v. Attorney General of Massachusetts,* 383 U.S. 413, 420 (1966) where Mr. Justice Brennan speaking for the Court stated:

"It does not necessarily follow from this reversal that a determination that *Memoirs* is obscene in the constitutional sense would be improper under all

> circumstances . . . the circumstances of production, sale, and publicity are relevant in determining whether or not the publication or distribution of the book is constitutionally protected . . . In this proceeding, however, the courts were asked to judge the obscenity of *Memoirs* in the abstract, and the declaration of obscenity was neither aided nor limited by a specific set of circumstances of production, sale and publicity."

The case herein involves a drive-in theater exhibition which illuminates the nighttime sky of a residential area with a vivid portrayal of erotic sexual scenes. Surely in this context the exhibition is obscene and loses the protection of the First and Fourteenth Amendments and any claim that the obscenity must be judged on the film as a whole. This application of the obscenity statute does not inhibit expression or restrict and eliminate this film from display — but merely restricts its showing in a drive-in theater located as is the Park Y Drive-In Theatre. Petitioner also urges that judgment of the film without the accompanying sound track unfairly removes whatever redeeming social value the film might possibly possess. But that is precisely the way it is being disseminated and viewed by those outside the theater enclosure.

The decision that the film "Carmen Baby" is obscene in the context of its display at a drive-in theater rests on sound legal principles and precedent. Particularly when we consider "that because of visual impact of motion pictures, motion pictures of sexual scenes may transcend the bounds of constitutional guarantee long before a frank description of the same scenes in written words". *Landau v. Fording,* 245 Cal. App. 2d 820, 54

Cal. Rptr. 177 (1966), *aff'd per curiam,* 388 U.S. 456 (1967); and "that films differ from other forms of expression". *Freedman v. Maryland,* 380 U.S. 51, 61 (1965). These principles had previously been established in *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495 (1952) where Justice Clark speaking for the Court stated:

> "To hold that liberty of expression by means of motion pictures is guaranteed by the First and Fourteenth Amendments, however, is not the end of our problem. It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places. * * * Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression."

Numerous other decisions of this Court and views of its members support the proposition that the setting in which a material is placed and the context in which it is displayed or viewed are relevant to the determination of obscenity. *Ginzburg v. United States,* 383 U.S. 463 (1966), *Stanley v. Georgia,* 394 U.S. 557 (1969); *Kingsley Books, Inc. v. Brown,* 354 U.S. 436 (1957) (dissenting opinion of Chief Justice Warren); *Roth v. United States,* 354 U.S. 476 (1957) (concurring opinion of Chief Justice Warren); *Ginzburg v. United States, supra,* (dissenting opinion of Mr. Justice Stewart and note 1 at 498); *Mishkin v. New York,* 383 U.S. 502 (1966).

Even the often criticized Commission on Obscenity and Pornography while advocating a removal of most

obscenity statutes recognizes a need for restrictions on public displays of obscenity. *Report of the Commission on Obscenity and Pornography,* Part Two Recommendations of the Commission, Sec. II, C, states in part:

> "The Commission's recommendations in this area are based upon its findings, through its research, that certain explicit sexual materials are capable of causing considerable offense to numerous Americans when thrust upon them without their consent."

The right of individuals within their own homes and neighborhoods to be protected from a blatant and obtrusive display is paramount to the theater's right to display on a large outdoor screen, an arguably obscene movie. The individual's right of privacy is a fundamental constitutional right within the protection of the Bill of Rights and the meaning of the Ninth Amendment which provides: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." See *Griswold v. Connecticut,* 381 U.S. 479 (1965). The instant case involves a balance between competing rights of the individual. The application of the Washington obscenity statute, RCW 9.68.010, to prohibit this type of problem does not amount to a suppression of the film nor does it unduly restrict the producer's First Amendment right of expression. It merely restricts the exhibition of this film in a manner involving an obtrusive display. The film may still be produced and displayed to willing individuals in an indoor theater. It has in fact, subsequently been exhibited in an indoor theater in Benton County, Washington.

The state obscenity statute, RCW 9.68.010, as applied in this case is neither vague nor overboard. It proscribes the exhibition of obscene motion pictures and in the context of the particular display the film "Carmen Baby" was held to be obscene (App. 90). See *Roth, supra,* where at page 491, Mr. Justice Brennan speaking for the Court stated:

> "Many decisions have recognized that these terms of obscenity statutes are not precise. This Court, however, has consistently held that lack of precision is not itself offensive to the requirement of due process. '* * * (T)he Constitution does not require impossible standards': all that is required is that the language 'conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices * * *.' United States v. Petrillo, 332 U.S. 1, 7-8, 67 S.Ct. 1538, 1542, 91 L. Ed. 1877. These words, applied according to the proper standard for judging obscenity, already discussed, give adequate warning of the conduct proscribed and mark '* * * boundaries sufficiently distinct for judges and juries fairly to administer the law * * *. That there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define a criminal offense * * *.'"

The obscenity statute gives sufficient warning to men of common intelligence and there is ample guidance for the producer and exhibitor. The movie industry imposes upon itself a rating system and when movies are given an X rating or limited to adults only, it is ample notice that they should not be displayed outdoors blatantly and obtrusively.

II

RIGHT OF PRIVACY MAY BE PROTECTED FROM AN OUTDOOR DISPLAY OF AN ARGUABLY OBSCENE MOVIE WITHOUT INFRINGING ON FIRST AMENDMENT RIGHTS

There is no authority for the proposition that the right of privacy exists only if established by statute as petitioner implies. In reliance on *Griswold v. Connecticut, supra,* the court below has determined that "the right of privacy is enshrined as a constitutional doctrine" (App. 96). This fundamental right would seem to be the foundation of this Court's decision in *Stanley v. Georgia,* 394 U.S. 557 (1969). And *Redrup, supra,* obviously recognized this fundamental right. *Griswold, supra,* very clearly defines the right of privacy as one protected by the Bill of Rights and one of those rights retained by the people within the meaning of the Ninth Amendment.

Neither is there any authority indicating that a special statute need be enacted to protect an unwilling individual from a blatant or obtrusive display of a movie which has a dominant theme appealing to the prurient interest in sex. *Redrup* did not suggest such a statutory requirement as it clearly did in the case of a state's concern for juveniles. The opinion of the Washington Court held that the dominant theme of the movie "Carmen Baby" appeals to the prurient interest (App. 90), and in the context of its open exhibition in close proximity to homes and highways it lost whatever redeeming social value, if any, it had. In that context it was obscene and subject to the criminal sanctions of

Washington's obscenity statute, RCW 9.68.010.

Petitioner also questions whether there was an actual assault on individual privacy contending the record shows no complaints. The trial court recognized the obvious from the location of the screen and the proximity of the houses. The complaint was made by a police sergeant who first observed the film while driving by the drive-in theater and who is no less a resident of his community than others. The record before the justice court and superior court included the fact that the previous case involving petitioner resulted from a complaint of a private citizen as set out in the Order permitting forfeiture which was attached to the transcript on appeal from justice court (App. 28), and thus became a part of the record. Furthermore, having once made a complaint of this type, those residents had a right to rely on their police officers to properly enforce the law as Sergeant Gordon did on behalf of the community he represents.

Petitioner argues that the rule announced in *Cohen v. California,* 403 U.S. 15 (1971), is applicable to this case. However, a reading of *Cohen* clearly indicates that it is distinguishable from the case herein. In *Cohen,* this Court specifically pointed out that it was not an obscenity case and stated:

> "... this case cannot be said to fall within those relatively few categories of instances where prior decisions have established the power of government to deal more comprehensively with certain forms of individual expression simply upon a showing that such a form was employed. This is not, for example,

an obscenity case. Whatever else may be necessary to give rise to the States' broader power to prohibit obscene expression, such expression must be, in some significant way, erotic. Roth v. United States, 354 U.S. 476. . ."

Cohen also recognized a distinction between an unwitting viewer outside his home and one within the privacy of his home. It was the residents within their own homes that the court below correctly considered in reference to the obtrusive assault on their individual privacy.

III

SEIZURE OF A SINGLE COPY OF A FILM AS EVIDENCE IN A CRIMINAL TRIAL DOES NOT REQUIRE A PRIOR ADVERSARY HEARING AND DISTINCTION EXISTS BETWEEN SEIZURE AIMED AT SUPPRESSION AND SEIZURE AIMED AT OBTAINING EVIDENCE OF THE CRIME CHARGED.

The Washington State Supreme Court has carefully and thoroughly reviewed the decisions pertaining to the procedures necessary to seize allegedly obscene material for evidentiary purposes. Their opinion (App. 83-88) recognizes and appreciates a distinction various other lower courts have been unwilling to acknowledge. That is, a distinction between seizures aimed at suppression or "prior restraint" and seizures aimed at obtaining evidence for use in a criminal prosecution.

The decisions of this Court considering this particular question are *Marcus v. Search Warrants of Prop-*

erty, 367 U.S. 717 (1961); *A Quantity of Books v. Kansas,* 378 U.S. 205 (1964), and *Lee Art Theatre, Inc. v. Virginia,* 392 U.S. 636 (1968). In *Marcus,* officers seized approximately 11,000 copies of 280 different publications with a search warrant under Missouri procedures authorizing seizure preliminary to destruction. In *A Quantity of Books* there was a seizure of 1,715 copies of 31 novels with a search warrant issued under a Kansas statute authorizing seizure and then after determination of obscenity, destruction by burning. Both *Marcus* and *A Quantity of Books* were civil proceedings against the materials and cases aimed at suppression involving a prior restraint without a determination of the obscenity question before seizure. In *Marcus* the procedures were held unconstitutional because they were not "designed to focus searchingly on the question of obscenity". In *A Quantity of Books* the Court held the procedures were as deficient as in the case of *Marcus,* adding that only a prior adversary hearing could fulfill the requirement of a "searching" inquiry into the question of obscenity as required by *Marcus.*

The *Lee Art Theatre* case involved seizure of a motion picture for use as evidence under authority of a warrant issued on the conclusory affidavit of a police officer and the *per curiam* opinion did not say that seizure of a motion picture required a prior adversary hearing and only held that the seizure must be proceeded by a judicial inquiry "designed to focus searchingly on the question of obscenity".

Some circuit courts have considered this question and

ruled on the basis of the Court's opinion in *A Quantity of Books*. The first of these was *Metzger v. Pearcy*, 393 F. 2d 202 (7th Cir. 1968), which involved the seizure of four copies of a single motion picture film. While the circuit court affirmed a district court Order enjoining interference with the exhibition of the motion picture film, it did recognize the need for evidence in a criminal prosecution and ordered delivery to the prosecuting attorney of one print of the film for use in trial or preparation for trial. The difference between seizure of four copies of the film and one copy as evidence again points out the distinction between seizure aimed at suppression or "prior restraint" and a seizure aimed at evidence for use in trial. Respondent believes *Metzger* misconstrued *A Quantity of Books* which was in a very true sense a suppression case involving prior restraint and not necessarily applicable to motion pictures. At least three of the circuit courts have followed the procedure in *Metzger* and have ordered delivery of one copy of the motion picture film to the prosecution for use as evidence in trial. *Bethview Amusement Corp. v. Cahn*, 416 F. 2d 410 (2d Cir. 1969) suggests other alternatives to seizure such as a subpoena duces tecum or an order to show cause. Both of these alternatives clearly violate Fifth Amendment rights against self incrimination and these various decisions fail to explain how the suppression would be any less with a court ordered delivery of a film than it would be when a film is seized by the officers for use in criminal prosecution. These various alternatives suggesting an order to show cause or a subpoena duces tecum while overlooking the possibility that the defendant may refuse on the basis of his

Fifth Amendment right against self incrimination also overlook the fact that the film may have subsequently been removed from the jurisdiction or even edited to remove objectionable parts.

The better rule would seem to be that whether or not such a hearing is required depends on the nature and purpose of the seizure. The inconsistent suggestions and decisions of the various lower courts are the result of trying to apply the suppression or "prior restraint" cases like *A Quantity of Books* to motion picture cases involving a single copy of a film as evidence in a criminal trial. The more plausible and consistent view is expressed in *New York v. Heller,* (decided December 1, 1971) N. Y. Law Journal December 16, 1971, which held that a prior adversary hearing is not required indicating that "there are intrinsic procedural difficulties in requiring such hearings." See also *Bazzell v. Gibbens,* 306 F. Supp. 1057 (E.D. La. 1969); *Rage Books, Inc. v. Leary,* 301 F. Supp. 546 (S D. N. Y. 1969); *Entertainment Ventures, Inc. v. Brewer,* 306 F. Supp. 802 (M.D. Ala. 1969), and *Merritt v. Lewis,* 309 F. Supp. 1249, (E.D. Cal. 1970).

It has also been suggested in lower court decisions such as *Bethview Amusement Corp., supra,* that the suppression in the case of a single copy of a film is just as significant because of the large number of individuals which might view a film thereby indicating that preventing a large number of people from viewing a film is no different than preventing a similarly large number of books from being circulated. This reasoning

also fails to explain how the procedure of *Metzger* requiring a delivery of the film is any less of a suppression than a seizure of one copy of a film for evidentiary purposes.

This Court's only direct pronouncement regarding seizure of motion pictures for evidence was the *per curiam* opinion of *Lee Art Theatre* which did not state that a prior adversary hearing was necessary, but while recognizing First Amendment safeguards, did hold that seizure must be proceeded by a judicial inquiry "designed to focus searchingly on the question of obscenity". The opinion recognized the problems peculiar to motion pictures in determining "that a judge may read a copy of a book in a court room or chambers but not as easily arrange to see a motion picture there". The procedures followed in the instant case clearly meet the constitutional safeguards and requirements of *Lee Art Theatre*. Justice of the Peace Yencopal who conducted the inquiry has indicated:

> "Even though I followed the procedures formulated by the Supreme Court, I was not aware of them at the time I did this. I did this on my own initiative — so as not to consider lightly charges made involving matters normally guaranteed under the free speech amendment. I did *judicially scrutinize* the complainant about the movie before I issued the warrant. I did this in light of determining if there was probable cause to make an arrest for showing an obscene movie — *obscene as defined by the Supreme Court in Roth v. United States*, 354 U.S. 476 . . . the purpose of the probable cause hearing was a procedure designed to focus searchingly on the question of obscenity." (App. 13) (Emphasis added)

The justice of the peace did not accept the mere conclusions of the officer nor merely an affidavit from him but rather took testimony regarding various scenes of the movie and its content during a hearing, only part of which was transcribed. The justice of the peace indicated in his Order Denying the Motion to Suppress some of the other scenes about which Sergeant Gordon testified (App. 13).

Justice of the Peace Yencopal was also cognizant of the contextual setting in which the film was being displayed as is apparent from his ruling in petitioner's previous case where bail forfeiture was permitted. As the ultimate decision rested on a finding of obscenity in the context of the film's use and display the judge's initial inquiry prior to issuance of the warrant properly included a consideration of the outdoor display. The Superior Court Judge recognized this same consideration when he also denied the motion to suppress (App. 32).

The decisions of this Court do not support petitioner's contention that a full adversary hearing is necessary prior to seizure of a motion picture film for evidentiary purposes. Such a requirement would as Justice Harlan has stated: "Make adjudication not merely 'not as easily arranged' in the case of movies but quite impossible". *Lee Art Theatre, supra,* (dissenting opinion). There is even less reason for an adversary hearing in a case involving an outdoor display.

Petitioner also argues that the length of time this

film has been impounded is a restraint of First Amendment rights, citing *United States v. Thirty-Seven Photographs*, — U.S. —, 28 L. Ed. 2d 822 (1971). Petitioner fails to recognize that his case was tried by the justice court on October 3, 1968, some thirty-four (34) days after the arrest and seizure. The chronological proceedings previously set out herein, show the various motions which necessarily precluded an earlier disposition. Certainly, the time required by the appeal process should not be a deciding factor. *Freedman v. Maryland*, 380 U.S. 51, 60 (1965) limited to preservation of the status quo for the shortest, fixed period compatible with sound judicial resolution, any restraint imposed in advance of prompt, final, judicial determination, and *Thirty-Seven Photographs, supra*, suggested a seventy-four (74) day maximum. Petitioner's trial in justice court was held within thirty-four (34) days and a judicial determination entered within thirty-eight (38) days. See *Byrne v. Karalexis*, 401 U.S. 216, 221 (1971) and Mr. Justice Brennan's opinion joined by Mr. Justice White and Mr. Justice Marshall stating, "Freedman was satisfied by a 'prompt judicial decision *by the trial court*' ".

CONCLUSION

Respondent submits on the basis of the foregoing reasons, the ruling and judgment of the Supreme Court of Washington should be affirmed.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1971

No. 71-247

WILLIAM RABE,
Petitioner,

v.

STATE OF WASHINGTON,
Respondent.

REPLY BRIEF OF PETITIONER

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WILLIAM RABE,
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REPLY BRIEF OF PETITIONER

ARGUMENT IN REPLY

I.

The State's brief further underscores the severe abridgement of protected speech inherent in the decision under review. While apparently conceding that the motion picture at issue is non-obscene under the constitutional standard,[1] respondent argues that the State courts were not required to assess it for alleged obscenity *vel non*, but were free to condemn it, and to impose criminal sanctions upon petitioner, because isolated passages were presum-

1. Material may not be suppressed as obscene, or its dissemination punished, unless three elements are proved: "[I]t must be established that (a) the dominant theme of the material taken as a whole appeals to a prurient interest in sex; (b) the material is patently offensive because it affronts contemporary community standards relating to the description or representation of sexual matters; and (c) the material is utterly without redeeming social value." *A Book v. Attorney General of Massachusetts*, 383 U.S. 413, 418 (1966).

ably visible to persons outside the theatre (e.g., Resp. Br. 6, 10, 12). Respondent asserts that petitioner's conviction "merely restricts the exhibition of this film in a manner involving an obtrusive display," and says with apparent approval that the same motion picture has since been exhibited at an indoor theatre in the county where this prosecution arose, a fact not shown in the record (Resp. Br. 12). It is claimed that, although RCW 9.68.010 says nothing about allowing the exhibition of a film indoors while making it a crime to show the same film outdoors, the statute "as applied in this case is neither vague nor overboard [*sic*]" (Resp. Br. 13). Yet while implying that a different substantive standard applies under the statute to drive-in theatres than to conventional theatres, the State wholly fails to suggest what that second standard might be.

At least three basic constitutional infirmities pervade the State's argument outlined above:

1. The statute invoked here is a general obscenity law which, like those of the other States, permits the total suppression of an offending work as being outside the realm of protected speech. In no other area of communication do the States possess such power to suppress and punish as they wield in the area of obscenity. Guarding against the obvious dangers to First Amendment freedoms which inhere in that power, this Court has carefully developed a specific and narrow definition of obscenity in *Roth v. United States*, 354 U.S. 476 (1957), and subsequent cases (*supra*, footnote 1). Washington, in the case at bar, has thrust aside that constitutional meaning and convicted petitioner for exhibiting a film deemed partially "offensive" or "obtrusive" (A. 89, 93, 95, 96). In so doing,

it has deprived the general obscenity statute of its ascertainable meaning and rendered it fatally vague and uncertain.

That the statute as applied here is standardless is tacitly admitted by the State when it suggests that exhibitors adopt a private rating system as a measure of criminal liability. Referring to the Motion Picture Code and Rating Program, respondent says:

> "The movie industry imposes upon itself a rating system and when movies are given an X rating or limited to adults only, it is ample notice that they should not be displayed outdoors blatantly and obtrusively." (Resp. Br. 13)

Surely the *ex-post facto* invocation of an unofficial rating system cannot fill the office of a statutory standard of criminal law.[2]

2. There is no warrant in any of this Court's decisions for Washington's abandonment of the substantive standard of *Roth*. The "pandering" cases relied upon by the State in effect enunciated a rule of evidence while making clear

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2. Under the motion picture industry's voluntary rating system, known formally as the Motion Picture Code and Rating Program, films submitted are placed into one of four categories: *G* (general audiences; all ages admitted); *PG* (parental guidance suggested; some material may not be suitable for pre-teenagers); *R* (restricted; under 17 requires accompanying parent or adult guardian); *X* (no one under 17 admitted). There is nothing in the record of this case which indicates the standards upon which rating judgments are based, nor whether these rating standards would comport with what this Court determines to be the appropriate constitutional standards for determining whether a particular presentation may be punished on account of "obtrusiveness." It is obvious that X-rated films are not believed to be obscene by the industry representatives entrusted with the ratings, or they would not be circulated even for adult viewing. Moreover, reliance upon these ratings in this context would raise a substantial constitutional question as to unlawful delegation of legislative authority. See, *e.g.*, *Drive In Theatres, Inc. v. Huskey*, 305 F.Supp. 1232 (W.D.N.C. 1969), aff'd 435 F.2d 228 (4th Cir. 1970).

that an adjudication of obscenity *vel non* continues to be required in prosecutions under general obscenity statutes. *E.g., Ginzburg v. United States,* 383 U.S. 463, 475 (1966); *A Book v. Attorney General of Massachusetts,* 383 U.S. 413, 420 (1966).

Nor do the post-*Roth* cases lend the slightest support to the view that a State may disregard the requirement that the allegedly offending material be utterly without redeeming social importance. The absence of any such value is the foundation stone of obscenity law:

> "[I]mplicit in the history of the First Amendment is the rejection of obscenity as utterly without redeeming social importance." *Roth v. United States,* 354 at 484.

All ideas having even the slightest importance, including those most controversial or hateful, have the full protection of the constitutional guaranties, as does the portrayal of sex in works of art and literature. *Roth, supra,* 354 U.S. at 484, 487. This principle, above all others, is at the heart of First Amendment liberty. *Cf. New York Times v. Sullivan,* 376 U.S. 254 (1964).

3. Implicit in the State's argument is the notion that the constitutional standard of definiteness in a speech-restricting statute is less stringent where the aim is to preserve privacy. Yet this Court emphasized in *Interstate Circuit, Inc. v. Dallas,* 390 U.S. 676 (1968), that in a First Amendment context the permissible extent of vagueness is *not* variable with the purpose of the statute in question:

> "Nor is it an answer to an argument that a particular regulation of expression is vague to say that it was adopted for the salutary purpose of protecting children. The permissible extent of vagueness is not directly proportional to, or a function of, the extent of

the power to regulate or control expression with respect to children.

"• • •

"The vices—the lack of guidance to those who seek to adjust their conduct and to those who seek to administer the law, as well as the possible practical curtailing of the effectiveness of judicial review—are the same." *Id.*, at 689-690.

It follows that a State cannot indulge in vagueness in a criminal statute directed to speech simply by asserting that it acts in the name of privacy. As the Court held in *NAACP v. Button*, 371 U.S. 415 (1963):

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.*, at 433.

As applied here, Washington's general obscenity statute subjects protected speech to unconstitutionally sweeping, vague, and unpredictable restraints. *Winters v. New York*, 333 U.S. 507 (1948). The inevitable result, unless petitioner's conviction is reversed, would be to impose a chilling censorship upon outdoor theatres and comparable activities throughout the nation.

II.

In response to petitioner's position that Washington's judicial extension of its obscenity statute to punish conduct not specified therein deprives him of due process of law (Pet. Br. 22-26), respondent argues that while a specific statute may be required to implement a State's concern for juveniles, none is necessary to support criminal prosecution of speech where privacy is allegedly invaded (Resp. Br. 9, 14). No authority is cited except the *per curiam* decision in *Redrup v. New York*, 386 U.S. 767 (1967), which does not stand for the proposition stated.

The State has overlooked the fundamental rule that the criminal statute itself, not the charge against the defendant, must specify the prohibited conduct:

> "It is the statute, not the accusation under it, that prescribes the rule to govern conduct and warns against transgression. [Citations omitted.] No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes." *Lanzetta v. New Jersey*, 306 U.S. 451, 453 (1939).

Where State courts judicially enlarge a statute to make criminal, in a defendant's own case, that which was not made criminal before, the requirement of fair warning is breached and the conviction must be reversed. *Bouie v. Columbia*, 378 U.S. 347 (1964); *Shuttlesworth v. Birmingham*, 382 U.S. 87 (1965).

The State suggests that *Cohen v. California*, 403 U.S. 15 (1971), is inapplicable because it was categorized by the Court as a non-obscenity case (Resp. Br. 15-16). But *Cohen*, a First Amendment case, is controlling because there, as here, a State had unconstitutionally imposed punishment upon speech uttered in a certain setting in the absence of a statute putting the defendant on notice that certain types of speech would not be tolerated in certain places. *Id.*, at 403 U.S. 19.

It is no answer to say that a constitutional right of privacy exists (Resp. Br. 6, 14). The existence of such a right cannot conceivably mean that one who engages in constitutionally-protected speech allegedly infringing upon privacy thereby subjects himself, without statutory warning, to the imposition of a jail sentence or fine.

In arguing to the contrary, respondent cites a recommendation of the Commission on Obscenity and Pornog-

raphy for restricting public displays of explicit sexual materials (Resp. Br. 11-12). To be accurate, the State should have quoted the Commission's sentence which comes immediately before the one quoted in its brief:

> "The Commission recommends enactment of state and local *legislation* prohibiting public displays of sexually explicit pictorial materials . . ." *Report,* Government Printing Office, page 60 (emphasis added). See also, page 67 for a draft of proposed legislation.

The Commission thus recommends the very element lacking here, *i.e.,* a statute particularly directed to obtrusive displays.

In *United States v. Reidel,* 402 U.S. 351 (1971), the Court discussed the need for legislation if obscenity standards are to change:

> "It is urged that there is developing sentiment that adults should have complete freedom to produce, deal in, possess, and consume whatever communicative materials may appeal to them and that the law's involvement with obscenity should be limited to those situations where children are involved or where it is necessary to prevent imposition on unwilling recipients of whatever age. . . . This may prove to be the desirable and eventual legislative course. *But if it is, the task of restructuring the obscenity laws lies with those who pass, repeal, and amend statutes and ordinances.* Roth and like cases pose no obstacle to such developments." *Id.,* at 402 U.S. 357; emphasis added.

Washington's action in bypassing the necessary legislation, and convicting petitioner of an unforseeable common law crime, is a denial of due process. *Bouie v. Columbia, supra.*

The State has, moreover, pointed to no evidence that any such crime was in fact committed. The required "publication in a manner so obtrusive as to make it impossible

for an unwilling individual to avoid exposure" (*Redrup, supra*, 386 U.S. 769) did not occur here. Nor is there any "showing that substantial privacy interests are being invaded in an essentially intolerable manner," *Cohen v. California*, 403 U.S. 15 (1971). Respondent's assertion that the outdoor screen "illuminates the nighttime sky of a residential area" (Resp. Br. 10) is devoid of support in the record. No one so testified. Nor can proof of guilt be supplied by such statements as "[t]he trial court recognized the obvious," or the "residents had a right to rely on their police officers" (Resp. Br. 15). The fact remains that there is no evidence that any non-consenting person complained about the film, or even saw any part of it.

Petitioner's conviction, which depends upon the assumption that some unknown viewer *might* have seen the film and been offended, cannot stand in the absence of proof. *Thompson v. City of Louisville*, 362 U.S. 199 (1960).

III.

In most legal settings, an owner is entitled to notice and opportunity to be heard before being deprived of his property. *E.g., Goldberg v. Kelly*, 397 U.S. 254 (1970). That basic principle of fairness is doubly important where First Amendment freedoms are at stake. The film exhibitor, and the bookseller, should have the right to appear in court and present evidence and argument in support of the lawfulness of their communications materials before those materials are seized by the State. That right can only be assured if a pre-seizure adversary hearing is required.

Respondent argues that a distinction must be made between seizures aimed at suppression and those aimed at obtaining evidence for criminal prosecution (Resp. Br.

16, 19)[3] Yet there is as great a need for safeguards in criminal evidentiary seizures as in those made pursuant to civil litigation. A criminal prosecution affords no guarantee of prompt judicial determination of the obscenity *vel non* of the seized material. *Marcus v. Property Search Warrant*, 367 U.S. 717, 737-38 (1961). If non-obscene films are seized, there is no assurance that the unconstitutional suppression will be of short duration. *Cf. Freedman v. Maryland*, 380 U.S. 51 (1965); *United States v. Thirty-Seven Photographs*, 28 L.Ed.2d 831 (1971).

The present case illustrates the prolonged *de facto* censorship involved in criminal prosecutions. It is no answer to say that petitioner's justice court trial occurred within thirty-four days after the seizure (Resp. Br. 22). Petitioner's trial in Superior Court—the State court of general jurisdiction, at which those accused of gross misdemeanors are entitled to *de novo* trials, *State v. Miller*, 365 P.2d 612 (Wash. 1961)—did not commence for more than six month after the seizure. Another six months went by before the entry of findings and judgment, and the film was thus totally suppressed for more than a year prior to the entry of the judgment from which appeal was taken to the Supreme Court of Washington.

To treat such prolonged suppression as inconsequential because a film rather than a book is involved is to ignore reality. The effective result is to deprive a large audience of protected communication. *Astro Cinema Corp. v.*

3. *People v. Heller*, N.Y. Law Journal, Dec. 16, 1971 cited by respondent (Resp. Br. 19), represents a conflict with the federal decisions within the Second Circuit, which continue to uphold the adversary hearing requirement. See, *e.g.*, *Mod Amusement Company, Inc. v. Murphy*, (S.D.N.Y. 72 Civ. 1, filed January 7, 1972), following *Bethview Amusement Corp. v. Cahn*, 416 F.2d 410 (2nd Cir. 1969), cert. denied, 397 U.S. 920 (1970).

Mackell, 422 F.2d 293, 295 (2d Cir. 1970); and see Petitioner's Brief 31.

Courts have the power to compel the production of books and films, intact, for use in evidence at trials. A variety of ways to do this has been suggested, *e.g.*, *Astro Cinema Corp., Inc. v. Mackell*, 422 F.2d 293 (2d Cir. 1970) (court order or use of subpoena *duces tecum* requiring defendant, subject to contempt power, to make a copy of the film available to the prosecution); *Demich, Inc. v. Ferdon*, 426 F.2d 643 (9th Cir. 1970), *reversed on other grounds*, 39 U.S.L.W. 3424 (1971) (protective order by magistrate forbidding defendant to tamper with or remove film); *Bethview v. Cahn*, 416 F.2d 410 (2d Cir. 1969) (*ex. parte* restraining order forbidding tampering with or removal of film).[4]

Thus the interests of law enforcement can be served while First Amendment rights are protected.

Respondent here argues that, although the Justice of the Peace was unaware of the requirements of *Lee Art Theatre, Inc. v. Virginia*, 392 U.S. 636 (1968), he nonetheless fulfilled them (Resp. Br. 20). Yet obviously the procedure could not have "focused searchingly" on the question of alleged obscenity where the only evidence

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4. If the film is found obscene by the magistrate in the adversary hearing, and a prosecution commenced, there is in fact no valid reason why the film should not be returned to the exhibitor after the hearing until its character *vel non* is determined at trial, subject to the exhibitor or owner making it available to prosecuting officials for purposes of trial preparation. This procedure has been approved by several federal circuit courts and ensures maximum preservation of free speech rights pending a final judicial determination, without impeding the State's ability to prosecute the defendant. *Astro Cinema Corp. v. Mackell*, 442 F.2d 293 (2d Cir. 1970); *Metzger v. Pearcy*, 393 F.2d 202 (7th Cir. 1970); *Tyrone, Inc. v. Wilkinson*, 410 F.2d 639 (4th Cir. 1969).

was the testimony of a police officer who had seen less than the entire motion picture and could not testify regarding its thematic content because he had viewed it from a distance without hearing the sound track (Pet. Br. 6, 7; 27). Petitioner should have been afforded a chance to present evidence. The seizure here, resulting in the suppression of a manifestly non-obscene film for many months, is striking evidence that only an adversary hearing will suffice in light of the First Amendment.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

NO. 71-247

WILLIAM RABE,

Petitioner,

v.

STATE OF WASHINGTON,

Respondent.

PETITION FOR REHEARING

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IN THE

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OCTOBER TERM, 1971

NO. 71-247

WILLIAM RABE,

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v.

STATE OF WASHINGTON,

Respondent.

PETITIONER FOR REHEARING

Respondent, State of Washington, prays that a rehearing be granted of this Court's decision of March 20, 1972, reversing the judgment of the Supreme Court of Washington in the above-entitled case, in order that (1) the Court as a whole may re-examine the soundness of its holding that the Washington Statute did not give the defendant, "fair notice," regarding the nature of the criminal liability which was attached to the statute, and (2) so that the individual Justices might reconsider their acceptance of a "per curiam" opinion which reasonably can be expected to underming rudimentary law enforcement principles in the obscenity area.

REASONS FOR GRANTING REHEARING

AND RESTORING CASE TO DOCKET

FOR ARGUMENT

I.

SECTION 9.68.010 OF THE REVISED CODE OF WASHINGTON GIVES FAIR NOTICE AS TO THE NATURE OF THE CRIMINAL LIABILITY WHICH ATTACHES TO THE STATUTE.

In 1961, the Washington Legislature amended R.C.W. Section 9.68.010 to read as follows:

"9.68.010 Obscene literature, Shows, etc. Every person who -

"(1) Having knowledge of the contents thereof shall exhibit . . . any . . . motion picture film . . . picture . . . image, or any object or thing which is obscene . . . . Shall be guilty of a gross misdemeanor." (Our emphasis.)

In view of the choice of language employed by the Legislature, it is difficult for Respondent to understand how Rabe can deny that the language of the statute gives fair notice, consistent with due process. The proscription set by the State Legislature was as to the public exhibition of "any picture" which is obscene and "any image" which is obscene. A more precisely defined limitation can hardly be imagined. Nor is the right of the State Legislature "to make each stick in a faggot a single criminal unit" open to serious question. See Washington v. Silverman, 292 P.2d 868, 871 (Jan. 19, 1956). Certainly Rabe cannot for a moment claim that he does not understand what the State Legislature meant when it used the term "obscene." That legislative body, in 1961, had every right to rely on this Court's judgments in such matters. That type of argument was foreclosed to Rabe by this Court's ruling in U.S. v. Roth

and California v. Alberts, 354 U.S. 476, 491, 1 L. Ed.2d 1498, 77 S. Ct. 1304 (June 24, 1957), decided four years before the adoption of R.C.W. 9.68.010 in its amended form. Further, that same claim of "vagueness" was made to this Court and again squarely rejected in Mishkin v. New York, 383 U.S. 502, 16 L. Ed.2d 56, 60, 86 S. Ct. 958 (Mar. 21, 1966) - five years after the statute was amended, and just two years before Rabe made his decision to exhibit "Carmen Baby" at the open air drive-in theater.

Stripping the case of the smoke screen laid by Petitioner's straw-man arguments and getting down to the bare essentials, we find a fact situation wherein a law enforcement officer, located on public property, observes "pictures" and "images" of copulation, fellatio, cunnilingus, and lesbian acts being projected on a public screen, in larger than life size. He also observes that these exhibitions are being broadcast indiscriminately to everyone else's view in the immediate area. The following day he seeks the counsel of the city attorney, and that evening, the officer and the city attorney view the same "pictures" and "images". On both occasions, they note that others are also observing the public screenings of "pictures" and "images" from outside the drive-in private property. The sergeant thereafter appears before a justice of the peace (who is also a lawyer) to whom he relates the nature of the "pictures" and "images" which he has observed, for the purposes of obtaining an arrest warrant. Can there be any question in the minds of the Justices on this Court that, in this context, the "exhibitions" violated the plain language statutory proscription which made illegal

the public exhibition of "pictures" which were obscene and the public exhibition of "images" which were obscene. What rational rule of law would require any off-the-scene, unwilling viewer to "stick around" and view the entire show so that he might be able to analyze the "dominant theme" for the purpose of satisfaying himself that the "images" and "pictures" which he instinctively judged to be obscene were really not obscene when "taken as a whole?" The statute doesn't require it, nor did the trial or the Washington Supreme Court require it under the circumstances of the case.

Respondent submits that this Court has failed to recognize that Rabe has created a straw man from which to argue, while at the same time misleading this Court as to the real basis for the ruling of the Washington Supreme Court. The core of the Washington Supreme Court ruling is found in the following language of the Court reported in Washington v. Rabe, 484 P.2d 917, at 921, which, at the same time, exposes the straw man created by Rabe:

> "Defendant next argues that the trial court's conclusion of law that 'individual portions or scenes of the movie "Carmen Baby" are obscene and to passing motorists or persons and residents outside the theater those individual scenes become a movie by themselves' is not legally sufficient under existing United States Supreme Court decisions to support the judgment of obscenity.
>
> "Considering the facts before us . . . we conclude otherwise." (Our emphasis.)

Rabe's straw-man argument is that the Washington Judic-

iary cannot interpret the statute to mean what it says, (i.e., to proscribe the exhibition of individual pictures or images which are obscene, because this Court's prior rulings will not permit such an interpretation.) The answer of the Washington Supreme Court was simple and direct, namely, that it did not so interpret this Court to have applied a restriction which would prevent the Court from utilizing the plain language of the statute and applying it according to its literal terms. This, of course, is just the opposite of what this Court says the Washington Supreme Court has done.

It must be emphasized here that the fundamental issue was not as to the straw man created by Rabe (whether the Washington Supreme Court's interpretation of this Court's most recent obscenity pronouncements was correct or not.) The fundamental issue was whether the conduct of Rabe in exhibiting individual scenes of fellatio, cunnilingus, lesbianism, etc., in the manner that he did came within the proscription of the statutory language which outlawed the exhibition f . . . motion picture films . . . pictures . . . and images which were obscene.

Consider, in the face of the above simple but clearly drawn statute, the nature of Rabe's argument to this Court. First of all, Rabe cannot deny that he had knowledge of "Carmen Baby's" contents, which means that he was aware he was projecting onto his drive-in screen "pictures" and "images" bigger than life which "were visible from afar" - pictures and images which trial Judge Yencopal describes as, "fondling of the breast," "fondling of the policeman's genitals," "orally copulating the policeman," etc. In the face of the

above hard facts, Rabe cleverly glosses over the legislative intent and specific language of the statute and, neglecting the outright proscription against "pictures" and "images" which are obscene, focusses his attention on the terminology, "motion picture film" with the undisguised aim of bringing himself within the shelter of a "dominant theme" and "taken as a whole" defense. While admitting at page 23 of his brief that the film was visible from afar, he nevertheless denies that the State Legislature has expressed any value judgment regarding the right to be free from offensive "displays." In the face of the plain language of the statutory proscription against "pictures" and "images" he argues at page 25:

> "Yet the occupants of houses in the vicinity would obviously have but a silent view of a distant screen, and would watch the images thereon, beyond an occasional glimpse, only to the extent that they chose to do so."
> (Our emphasis.)

Respondent submits that, contrary to the assertions made by Rabe, such arguments are not a confession and avoidance defense which is recognized by the law.

It bears recognition here that the past performance of the Washington Supreme Court in the obscenity area does not reveal a history of "reading" into obscenity legislation language which is not present in the statute, See State of Washington ex rel Lally v. Gump, 157 Wash. Dec. 116, 356 P.2d 289 (Oct. 27, 1960), which ruled that the prior statute was unconstitutional under this Court's decision in Smith v. California, 361 U.S. 147, 80 S. Ct. 215, 217, 4 L.Ed.2d 205 (Dec. 14, 1959) for failure to provide a "mens rea" element. Compare,

in this regard, the action of other state courts which read "scienter" into the state statute to avoid law enforcement problems created by the Smith decision: Cohen v. State, 125 So.2d 560 (Fla. 1960); State v. Jackson, 224 Ore. 337, 356 P.2d 195 (1960); State v. Miller, 112 S.E.2d 472 (1960); State v. Chobot, 12 Wisc. 2d 110, 106 N.W.2d 286 (1960), appeal dismissed for want of a substantial federal question, 368 U.S. 15, 82 S.Ct. 136, 7 L.Ed.2d 85 (1961); Louisiana v. Roufa, 241 La. 474, 129 So.2d 743 (1961); Demetropolos v. Commonwealth of Mass., 342 Mass. 658, 175 N.E.2d 259 (1961); State v. Oman, 261 Minn. 10, 110 N.W.2d 514 (1961); State v. Hudson County News, 35 N.J. 284, 173 A.2d 20 (1961); People v. Finkelstein, 9 N.Y.2d 342, 214 N.Y.S.2d 363, 174 N.E.2d 470 (1961), cert. den. 371 U.S. 863, 83 S. Ct. 116, 9 L.Ed.2d 100 (Oct. 15, 1962); State v. Locks, 91 Ariz. 394, 372 P.2d 724 (1962).

II.

THE LANGUAGE EMPLOYED IN THE PER CURIAM OPINION IS SUCH AS IS CERTAIN TO UNDERMINE RUDIMENTARY LAW ENFORCEMENT PRINCIPLES IN THE OBSCENITY AREA.

The language of the per curiam opinion underminds the entire structure of the obscenity law and casts in doubt what this Court's decisions in A Book Named John Cleland's Memoirs of a Woman of Pleasure v. Attorney General of Mass., 383 U.S. 413, 86 S. Ct. 975, 16 L. Ed.2d 1; Ginzburg v. U. S. , 383 U.S. 463, 86 S. Ct. 942, 16 L.Ed.2d 31; Mishkin v. N.Y.,383 U.S. 502, 86 S. Ct. 958, 16 L.Ed.2d 56 (1966) are supposed to mean.

R.C.W. 9.68.010 provides very simply that any person who with knowledge of the contents exhibits any

motion picture film . . . picture . . . image, or any object or thing which is obscene is guilty of a misdemeanor. In interpreting that statute in the light of this Court's rulings in obscenity cases, the Washington Supreme Court held at page 922:

> "However, we find that 'Carmen Baby' is obscene, when we consider, as the trial court did, the context of its exhibition."

The Washington Supreme Court's use of the underscored word "context" is explained on the same page as follows:

> "In adopting what has been termed a 'contextual' or 'variable' approach, the Court drew on the concurring opinion of Chief Justice Warren in Roth . . . ."

In referring to this Court's decision in A Book Named John Cleland's Memoirs of a Woman of Pleasure, supra, Ginzburg, supra, and Mishkin, supra, the Washington Supreme Court stated at page 923:

> "In these three cases, the court offered a flexible 'contextual' analysis to supplement to strict definitional requirements of Roth."

It is crystal clear from this language that the Washington Supreme Court was applying the same "variable" approach employed by the United States Supreme Court when it decided Ginzburg v. U.S. In Rabe, however, this Court now holds:

> "The statute under which petitioner was prosecuted, however, made no mention that the 'context' or location of the exhibition was an element of the offense somehow modifying the word 'obscene.' Petitioner's conviction was

thus affirmed under a statute with a meaning quite different from the one he was charged with violating."

If this is so, why then did Ralph Ginzburg go to prison? See Ralph Ginzburg v. U.S., 383 U.S. 463, 16 L. Ed. 2d 31, 86 S.Ct. 942; rehrg. den. 384 U.S. 934, 16 L. Ed. 2d 536, 86 S. Ct. 1440, and Ralph Ginzburg v. U.S., 436 F.2d 1386, pet'n for cert. to the U.S. Court of Appeals, 3rd Circuit, denied in 402 U.S. 976, 29 L. Ed. 2d 709, ___ S.Ct. ___, rehrg. den. 404 U.S. 875, 30 L. Ed.2d 121, __ S.Ct.___ (Oct. 12, 1971).

The language of this Court in Ginzburg v. U.S., supra, is unmistakably in point. At page 35 this Court said:

"We agree that the question of obscenity may include consideration of the setting in which the publications were presented as an aid to determining the question of obscenity, and assume without deciding that the prosecution could not have succeeded otherwise."

At footnote 6 this Court noted in the Ginzburg case:

"It is suggested in dissent that petitioners were unaware that the record being established could be used in support of such an approach, and that petitioners should be afforded the opportunity of a new trial. However, the trial transcript clearly reveals that at several points the Government announced its theory that made the mode of distribution relevant to the determination of obscenity, and the trial court admitted evidence, otherwise relevant, toward that end."

The same result was reached in the Mishkin case. At page 62, this Court held:

> "We adjust the prurient appeal requirement to social realities by permitting the appeal of this type of material to be assessed in terms of the sexual interests of its intended and probable recipient group . . . ."

Likewise, in Memoirs, this Court noted, at page 5:

> "Neither side availed itself of the opportunity provided by the section to introduce evidence 'as to the nature and form of its publication, advertisement and distribution'."

If the approach employed in the State of Washington is now to be regarded as a vice, why should not the state case have been sent back for retrial as footnote 6 suggests? Respondent has great difficulty in interpreting the language of this Court when it says, "The statute so construed, is impermissibly vague as applied to petitioner because of its failure to give him fair notice that criminal liability is dependent upon the place where the film is shown." Does this Court's comment at footnote 6 of Ginzburg mean that a variable standard is now an accomplished fact since the statute has been given a judicial gloss in Rabe?

CONCLUSION

Respondent, in seeking a rehearing herein, would respectfully submit to the Court that, while the trial facts of this case are of relative unimportance, the language employed by this Court in the per curiam opinion elevates the entire matter to one of monumental significance. This Court has in one short opinion undermined the longstanding precedent that the word "obscene" is not vague, and has,

at the same time, cast into considerable doubt the fundamental rule of obscenity law which makes the conduct of the actor a matter of primary importance. Respondent submits that a rehearing should be granted to permit further argument on the issues raised herein, or in the alternative, that the Court's opinion should be recalled and the petition for writ of certiorari dismissed as improvidently granted.

Respectfully submitted,

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CURTIS LUDWIG, Deputy
Prosecuting Attorney

Counsel for Respondent

RABE *v.* WASHINGTON

CERTIORARI TO THE SUPREME COURT OF WASHINGTON

No. 71-247. Argued February 29, 1972—Decided March 20, 1972

Petitioner was convicted of violating Washington's obscenity statute for showing a sexually frank motion picture at a drive-in theater. In affirming his conviction, the Washington Supreme Court did not hold that the film was obscene under the standards of *Roth* v. *United States*, 354 U. S. 476, and *Memoirs* v. *Massachusetts*, 383 U. S. 413, but that it was obscene in "the *context* of its exhibition" at a drive-in. The statute proscribing the knowing display of "obscene" films did not mention the location of the exhibition as an element of the offense. *Held:* A State may not criminally punish the exhibition of a motion picture film at a drive-in theater where the statute assertedly violated has not given fair notice that the location of the exhibition was a vital element of the offense.

79 Wash. 2d 254, 484 P. 2d 917, reversed.

William L. Dwyer argued the cause and filed briefs for petitioner.

Curtis Ludwig argued the cause for respondent. With him on the brief was *Herbert H. Davis.*

Briefs of *amici curiae* urging reversal were filed by *Stanley Fleishman* and *Sam Rosenwein* for the National Association of Theatre Owners, Inc., and by *Louis Nizer* and *James Bouras* for the Motion Picture Association of America, Inc.

Constantine Regusis filed a brief for Morality in Media, Inc., as *amicus curiae,* urging affirmance.

PER CURIAM.

Petitioner was the manager of the Park Y Drive-In Theatre in Richland, Washington, where the motion picture Carmen Baby was shown. The motion picture is a loose adaptation of Bizet's opera Carmen, con-

taining sexually frank scenes but no instances of sexual consummation are explicitly portrayed. After viewing the film from outside the theater fence on two successive evenings, a police officer obtained a warrant and arrested petitioner for violating Washington's obscenity statute. Wash. Rev. Code § 9.68.010. Petitioner was later convicted and, on appeal, the Supreme Court of Washington affirmed. 79 Wash. 2d 254, 484 P. 2d 917 (1971). We granted certiorari. 404 U. S. 909. We reverse petitioner's conviction.

The statute under which petitioner was convicted, Wash. Rev. Code § 9.68.010, made criminal the knowing display of "obscene" motion pictures:

> "Every person who—
>
> "(1) Having knowledge of the contents thereof shall exhibit, sell, distribute, display for sale or distribution, or having knowledge of the contents thereof shall have in his possession with the intent to sell or distribute any book, magazine, pamphlet, comic book, newspaper, writing, photograph, motion picture film, phonograph record, tape or wire recording, picture, drawing, figure, image, or any object or thing which is obscene; or
>
> "(2) Having knowledge of the contents thereof shall cause to be performed or exhibited, or shall engage in the performance or exhibition of any show, act, play, dance or motion picture which is obscene;
>
> "Shall be guilty of a gross misdemeanor."

In affirming petitioner's conviction, however, the Supreme Court of Washington did not hold that Carmen Baby was obscene under the test laid down by this Court's prior decisions. *E. g., Roth* v. *United States*, 354 U. S. 476; *Memoirs* v. *Massachusetts*, 383 U. S. 413. Uncertain "whether the movie was offensive to the standards relating to sexual matters in that area and whether

the movie advocated ideas or was of artistic or literary value," the court concluded that if it "were to apply the strict rules of *Roth*, the film 'Carmen Baby' probably would pass the definitional obscenity test if the viewing audience consisted only of consenting adults." 79 Wash. 2d, at 263, 484 P. 2d, at 922. Respondent read the opinion of the Supreme Court of Washington more narrowly, but nonetheless implied that because the film had "redeeming social value" it was not, by itself, "obscene" under the *Roth* standard. The Supreme Court of Washington nonetheless upheld the conviction, reasoning that in "the *context* of its exhibition," Carmen Baby was obscene. *Ibid.*

To avoid the constitutional vice of vagueness, it is necessary, at a minimum, that a statute give fair notice that certain conduct is proscribed. The statute under which petitioner was prosecuted, however, made no mention that the "context" or location of the exhibition was an element of the offense somehow modifying the word "obscene." Petitioner's conviction was thus affirmed under a statute with a meaning quite different from the one he was charged with violating.

"It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made." *Cole* v. *Arkansas*, 333 U. S. 196, 201. Petitioner's conviction cannot, therefore, be allowed to stand. *Gregory* v. *City of Chicago*, 394 U. S. 111; *Garner* v. *Louisiana*, 368 U. S. 157; *Cole* v. *Arkansas*, *supra*.

Under the interpretation given § 9.68.010 by the Supreme Court of Washington, petitioner is criminally punished for showing Carmen Baby in a drive-in but he may exhibit it to adults in an indoor theater with impunity. The statute, so construed, is impermissibly vague as applied to petitioner because of its failure to

give him fair notice that criminal liability is dependent upon the place where the film is shown.

What we said last Term in *Cohen* v. *California*, 403 U. S. 15, 19, answers respondent's contention that the peculiar interest in prohibiting outdoor displays of sexually frank motion pictures justifies the application of this statute to petitioner:

> "Any attempt to support this conviction on the ground that the statute seeks to preserve an appropriately decorous atmosphere in the courthouse where Cohen was arrested must fail in the absence of any language in the statute that would have put appellant on notice that certain kinds of otherwise permissible speech or conduct would nevertheless, under California law, not be tolerated in certain places. . . . No fair reading of the phrase 'offensive conduct' can be said sufficiently to inform the ordinary person that distinctions between certain locations are thereby created."

We need not decide the broad constitutional questions tendered to us by the parties. We hold simply that a State may not criminally punish the exhibition at a drive-in theater of a motion picture where the statute, used to support the conviction, has not given fair notice that the location of the exhibition was a vital element of the offense.

The judgment of the Supreme Court of Washington is

Reversed.

MR. CHIEF JUSTICE BURGER, with whom MR. JUSTICE REHNQUIST joins, concurring.

I concur solely on the ground that petitioner's conviction under Washington's general obscenity statute cannot, under the circumstances of this case, be sustained consistent with the fundamental notice requirements of

the Due Process Clause. The evidence in this case, however, revealed that the screen of petitioner's theater was clearly visible to motorists passing on a nearby public highway and to 12 to 15 nearby family residences. In addition, young teenage children were observed viewing the film from outside the chain link fence enclosing the theater grounds. I, for one, would be unwilling to hold that the First Amendment prevents a State from prohibiting such a public display of scenes depicting explicit sexual activities if the State undertook to do so under a statute narrowly drawn to protect the public from potential exposure to such offensive materials. See *Redrup* v. *New York*, 386 U. S. 767 (1967).[1]

Public displays of explicit materials such as are described in this record are not significantly different from any noxious public nuisance traditionally within the power of the States to regulate and prohibit, and, in my view, involve no significant countervailing First Amendment considerations.[2] That this record shows an offensive nuisance that could properly be prohibited, I have no doubt, but the state statute and charge did not give the notice constitutionally required.

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[1] For examples of recent statutes regulating public displays, see Ariz. Rev. Stat. Ann. § 13-537 (Supp. 1971-1972); N. Y. Penal Law §§ 245.10-245.11 (Supp. 1971-1972).

[2] Under such circumstances, where the very method of display may thrust isolated scenes on the public, the *Roth* v. *United States*, 354 U. S. 476, 489 (1957), requirement that the materials be "taken as a whole" has little relevance. For me, the First Amendment must be treated in this context as it would in a libel action: if there is some libel in a book, article, or speech we do not average the tone and tenor of the whole; the libelous part is not protected.